UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GARDNER TRUCKING, INC.

and

TEAMSTERS LOCAL NO. 63

Case Nos. 31-CA-191361
31-CA-192297
31-CA-192299
31-CA-195175
31-CA-197884
31-CA-201430
31-CA-201995

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for the Union

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases were tried on November 28-30, 2017 and January 9-11, 2018, in Los Angeles, California, based on allegations that Gardner Trucking, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) within a few weeks of learning that employees from its Chino, California facility were meeting with representatives from Teamsters Local No. 63 (Union) about organizing. Respondent learned of the organizing effort on December 28, 2016, when it discovered flyers throughout the Chino facility announcing an upcoming Union meeting. Thereafter, Respondent allegedly interrogated and impliedly threatened employees regarding their union activities, membership, and sympathies. Less than one week after the Union meeting, Respondent suspended and later discharged George Garcia. Less than two weeks after the meeting, Respondent discharged Ray Correa, Richard Dellorfano,[2] Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot. The General Counsel alleges these actions were in retaliation for the employees' union activities, and to discourage others from engaging in those activities. Respondent contends it suspended Garcia for failing to timely submit his required driver logs and then discharged him for falsifying his timesheets, and it later discharged the six others after conducting background checks and discovering they had falsified their employment applications by not disclosing their prior criminal convictions. The General Counsel and Union argue these reasons are pretextual, and that Respondent would not have taken these adverse actions in the absence of the Union organizing effort.

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[1] Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "G.C. Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "G.C. Br." for General Counsel's Brief; "U. Br." for the Union's Brief, and "R. Br." for Respondent's Brief.

[2] Although the pleadings and post-hearing briefs spell his last name as Dell'Orfano, his personnel records, his driver's license, and the spelling he gave prior to testifying indicate that Dellorfano is correct.

For the reasons stated below, I find Respondent violated Section 8(a)(1) of the Act when its president and his son separately interrogated employees regarding employees' union activities, membership, and sympathies. I further find Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot, because of the employees' union activities, and to discourage others from engaging in those activities. I recommend dismissing the remaining allegations.

STATEMENT OF THE CASE

Between January 13 and July 6, 2017, the Union filed unfair labor practice charges against Respondent in the above-referenced cases. On September 28, 2017, the Regional Director for Region 31 of the National Labor Relations Board (Board), on behalf of the General Counsel, issued an order consolidating cases, consolidated complaint, and notice of hearing alleging Respondent violated Section 8(a)(1) and (3) of the Act. On October 12, 2017, Respondent filed its answer. On November 28, 2017, at the start of the hearing, the General Counsel moved, without objection, to amend the consolidated complaint. Respondent orally answered the amended allegations. On January 9 and 10, 2018, the General Counsel again moved, without objection, to further amend the consolidated complaint. Respondent orally answered the amended allegations. Respondent denies all of the alleged violations of the Act.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, the Union, and the General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommendations:

FINDINGS OF FACT[3]

Jurisdiction and Labor Organization Status

Respondent has been a corporation with an office and place of business at 9032 Merrill Avenue, in Ontario, California where it has been engaged in the business of operating a trucking company that provides the service of line haul and full-service logistics. This location is between

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. In assessing the witnesses' credibility, I have relied primarily on demeanor. I also considered other factors, including: the context of the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the weight of the respective evidence; established or admitted facts; inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2nd Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was in and of itself incredible and unworthy of belief.

Chino and Ontario, California, and it is interchangeably referred to as either the Chino facility or the Ontario facility. In conducting its operations during the past 12 months, Respondent performed services valued in excess of $50,000 outside the State of California. Respondent admits, and I find that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As such, I find this dispute affects commerce and the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

Respondent also admits, and I find that, all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent's Operations

Respondent hauls general freight, including, but not limited to, corrugated cardboard, food products, water, and building materials. It has around 2,600 employees working at or out of its various locations. Respondent's largest location is its Chino facility, where it employs drivers, shop mechanics, yardmen, tire technicians, forklift operators, dispatchers, guards, leads, recruiters, administrators, managers, and other personnel.

Respondent's Chino "facility" is on a 25-acre parcel of land. (R. Exhs. 3-5). Most of the buildings, as well as the main entrance, are located the southeast corner of the property. To the left of the main entrance is an administrative office building where human resources, safety/compliance, recruiters, and other personnel are located. North of this building, across from a small parking lot, are the mechanic shop and the dispatchers' office. The mechanic shop is in a single-story building with offices and a parts counter. The dispatchers' office is on the top floor of a three-story building. The dispatchers assign loads/routes to the drivers. Between the mechanic shop and the dispatch office, there are covered bays where the mechanics service and repair vehicles, trailers, and equipment. Behind (west of) the mechanic shop is the tire shop. The tire technicians work here repairing and replacing tires on trucks and trailers. Across from (east of) the dispatch office are two "barns" where mechanics perform quick repairs, usually before the drivers leave the facility to begin performing their loads. Next to the dispatch office are the fuel pumps. The middle back (or far west side) of the property is where forklift operators remove and store corrugated cardboard products. The employee parking lot is in southwest corner of the property. Respondent's corporate office is about 9 miles away.

Tom Lanting is Respondent's President. Kathleen Moldenhauer was Director of Human Resources from mid-2015 through 2017. Christi Triay was Director of Human Resources until mid-2015. Selena Herrera is a Human Resources Assistant. Jordan Lanting is a Recruiter, as well as Tom Lanting's son. Luis Barragan is the Operations Manager. Nicholas Rendon, David Ceja, and Seth McMullan are Dispatchers. Danny Arzola was a Manager at the Chino facility until his termination in October 2016. Alex Arzola was a Manager at the Chino facility until his termination on December 22, 2016. Tom Lanting, Alex Arzola, Danny Arzola, Moldenhauer, and Triay are/were admitted supervisors and agents within Section 2(11) and (13) of the Act. (G.C. Exh. 14)(Tr. 916-921). Jordan Lanting, Rendon, Ceja, and Herrera are admitted agents within Section 2(13) of the Act. (Jt. Exh. 1)(Tr. 9-11).[4]

[4] I also conclude Operations Manager Luis Barragan is, at the very least, a Section 2(13) agent of Respondent. He oversees the dispatchers at the Chino facility. He can recommend someone be hired or discharged. He also attends daily managerial meetings. (Tr. 1094-1097)(R. Exh. 15). He then communicates information from higher management to the dispatchers. *D&F Industries*, 339 NLRB 618,

Employment Application and Hiring Process

Background

Respondent's hiring process is different for drivers than for non-drivers. The Department of Transportation (DOT) requires that employers perform certain screening and verification procedures before hiring a commercial driver. Also, Respondent performs criminal background checks on driver applicants, but not on non-driver applicants. (Tr. 954-955).

All applicants complete the same employment application. It requests personal information, professional qualifications, education, and work history. It also contains questions the applicant is to answer by checking a "yes" or "no" box, and, where necessary, providing additional information. One such question asks, "Have you ever been convicted of a criminal offense (felony or serious misdemeanor)?" If yes, the applicant is instructed to state the nature of the crime(s), when and where convicted, and the disposition of the case. There is no definition for what constitutes a "serious misdemeanor."

On the final page of the application, there are statements the applicant is to read and acknowledge by initialing. The first of these acknowledgement statements reads:

> I hereby certify that I have not knowingly withheld any information that might adversely affect my chances for employment and that the answers given by me are true and correct to the best of my knowledge. I further certify that I, the undersigned applicant, have personally completed this application. I understand that any omission or misstatement of material fact on this application or on any document used to secure employment shall be grounds for rejection of this application or for immediate discharge if I am employed, regardless of the time elapsed before discovery.

The second acknowledgement statement reads:

> I hereby authorize the company to thoroughly investigate my references, work record, education and other matters related to my suitability for employment and, further, authorize the references I have listed to disclose to the company any and all letters, reports and other information related to my work records, without giving me prior notice of such disclosure. In addition, I hereby release the company, my former employers and all other persons, corporations, partnerships and associations from any and all claims, demands or liabilities arising out of or in any way related to such investigation or disclosure.

Managers at the Chino facility have the independent authority to hire, but the individual must complete an employment application and that application must go to human resources. A human resources representative then conducts an orientation where the individual receives information, policies, and forms to review, complete, and sign. The individual is not considered an employee in the payroll system until after this has been done. Managers Danny and Alex Arzola often failed to timely submit applications for those they hired, and this delayed those individual's orientations and entry into the payroll system.

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619 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998) (agency status established when an employee is held out as a conduit for transmitting information to employees).

Hiring of the Six Alleged Non-Driver Discriminatees[5]

Tony Nava

Tony Nava and Alex Arzola are long-time friends. On April 29, 2014, at Arzola's suggestion, Nava filled out an employment application to work at the Chino facility as a mechanic trainee.[6] In response to the question asking whether he had ever been convicted of a criminal offense (felony or serious misdemeanor), Nava checked the "no" box, even though he had at least one felony conviction. (Jt. Exh. 9, pg. 11). Nava initialed the acknowledgement statements and signed and dated the application. (Jt. Exh. 9, pg. 14). Nava then gave his application to Arzola. Nava testified that although he did not check "yes" and list his conviction(s), Arzola already knew that Nava had a prior felony conviction.[7] When Arzola interviewed Nava for the position, there was no discussion about Nava's conviction or the responses on his application. Arzola eventually hired Nava.

About a year and a half after Nava started, he was told to fill out a new employment application, allegedly because there was a change in payroll companies. On December 2, 2015, Nava filled out a new application, which asked for the same information as the first application. Nava again checked the "no" box in response to the question asking if he had any criminal convictions. (Jt. Exh. 9, pg. 2). Nava again initialed the acknowledgement statements and signed and dated the application. (Jt. Exh. 9, pg. 5). At some point, Nava began working in an office position in the mechanic shop, inputting work orders. In late December 2016, as discussed below, he was promoted to a lead position.

Michael Talbot

In mid-January 2016, Michael Talbot went to the Chino facility inquiring about position as a tire technician. Talbot met with Danny Arzola. Arzola interviewed Talbot on the spot and gave him a job application to complete. Talbot looked through the application, saw the question about criminal convictions, and told Arzola that he wanted to be upfront about his felony conviction. Arzola told Talbot to leave the question blank because "the company didn't run background checks." Arzola added that if human resources ended up running a background check, they would give Talbot an opportunity to explain his felonies.

Talbot took the job application home to complete. As instructed, Talbot left blank the question asking if he had any criminal convictions. He also initialed the acknowledgement statements and signed and dated the application. (Jt. Exh. 3, pg. 8). The following day, Talbot returned to the facility and gave his application to Danny Arzola. Arzola told Talbot to give notice to his current employer because the job was Talbot's if he wanted it. Talbot quit his job and began working for Respondent a week later.

About two or three weeks after starting, Talbot was called into human resources, presumably for his orientation. He had a conversation with an unidentified woman who Talbot

[5] Alex Arzola, Kurt Leo Rojo, Tony Nava, and possibly others were/are members of the Mongols Motorcycle Club. I have not relied upon anyone's affiliation with this Club in assessing credibility.

[6] The application was for one of Respondent's sister companies, Classic Sales, Inc., but Nava worked at the Chino facility throughout his entire employment. (Tr. 428-429).

[7] Three years earlier, Nava asked Arzola at a party about any job openings at Respondent. In this conversation, Nava told Arzola he had a felony. Arzola stated he might have an opening. (Tr. 436-437).

believed may have been the human resources director, but he was not sure. She had a copy of his application in her hand. The two went through the application. Talbot saw that his response to whether he had ever been convicted of a criminal offense (felony or serious misdemeanor) remained blank, and it remained blank as of the time he left the meeting. (Tr. 148-151).[8] Talbot remained a day-shift tire technician throughout his employment.

Ray Correa

In March 2016, Ray Correa spoke with Michael Talbot about working for Respondent as a tire technician. Talbot told Correa that he should speak with Danny Arzola. Later that month, Correa went to the Chino facility and met with Danny Arzola. (Tr. 846-847). Arzola interviewed Correa for the position. Correa testified the two discussed his work experience and his criminal background. Correa told Arzola he did not have any felonies, but Correa did not say anything about his convictions for misdemeanors. Arzola told Correa that as long as he doesn't have any felonies he should be okay. At the end of the interview, Arzola offered Correa a job as a tire technician, and he showed Correa around where he would be working. Arzola told Correa that he would have an orientation and he would need to fill out a job application. Correa testified he did not receive an application before he was offered and accepted the job. (Tr. 846-848).

Correa testified he met with Human Resources Assistant Selena Herrera for his orientation on April 28, 2016. (Tr. 849). During the orientation, Herrera went through the job application with Correa. Correa testified that when she got to the question asking whether he had ever been convicted of a criminal offense (felony or serious misdemeanor), Correa informed Herrera that he did not have any felonies, but he had misdemeanors. He also told her he didn't remember what the offense was or when it occurred. According to Correa, Herrera told him that as long as he did not have any felonies, he should just mark the "no" box. Correa checked the "no" box, and he did not provide any explanation in the area below. (Jt. Exh. 4, pg. 5). He also initialed the acknowledgement statements and signed and dated the application. Correa was a night-shift tire technician throughout his employment.

Herrera testified that she does not specifically recall handling Correa's orientation, but she denied telling any applicant/employee with misdemeanors to just check "no" in response to the question of whether they had criminal convictions (felonies or serious misdemeanors). Based on the documentary evidence in the record, I credit Herrera over Correa.[9]

[8] Talbot's application is in the record. The "no" box is marked as to whether he had any criminal convictions. (Jt. Exh. 3, pg. 5). Talbot denied marking the box, stating he left it blank. I credit his denial. Talbot was one of three alleged discriminatees (Rojo and Sanchez) told by the person hiring him to leave the question blank after he disclosed having criminal convictions. And, like Rojo and Sanchez, despite leaving the question blank, the "no" box on Talbot's application was inexplicably marked as of the date of his termination. Finally, the other "yes" and "no" boxes on Talbot's application are marked with what appears to be an "x." But the "no" box in response to whether he had any criminal convictions is marked with an upward pointing curved arrow, similar to a reverse "J" with an arrow at the top. I find this marking sufficiently dissimilar from the others on Talbot's application to support that he did not mark the box.

[9] Correa testified he first filled out an application when he met with Herrera during his orientation on around April 28, 2016. But his application--in which he marked the "no" box regarding his criminal convictions--is signed and dated on March 15, 2016. (Jt. Exh. 4, pgs. 5 and 9). The evidence reflects that Danny and Alex Arzola typically had applicants complete an application around the time they interviewed for the position, and Correa interviewed with Danny Arzola in March 2016, which is consistent with the date he signed his application. Also, on March 15, 2016, Correa signed a form acknowledging and agreeing to Respondent's Drug and/or Alcohol Testing Policy. (Jt. Exh. 4, pg. 11). There are several

Richard Dellorfano

On May 27, 2016, Richard Dellorfano applied with Respondent to be a forklift operator at its Chino facility.[10] Dellorfano checked the "yes" box when responding to the question asking whether he has ever been convicted of a criminal offense (felony or serious misdemeanor). In the area below where applicants are asked to explain the nature of the crime(s), when and where they were convicted, and the disposition of the case, Dellorfano wrote "Evading 2003, DUI 2015." (Jt. Exh. 7, pg. 5). He also initialed the three acknowledgement statements. (Jt. Exh. 7, pg. 8). After Dellorfano completed the application, he gave it to Alex Arzola. He told Arzola that those were all the convictions for which he could remember the years in which they occurred, because he had some that were several years older. He asked Arzola if he wanted him to go home and get the paperwork he had about his convictions. Arzola responded, "Don't worry about it. Just put down what you can remember because I'm going to hire you." Dellorfano asked Arzola if he was sure, because Dellorfano said he did not want to quit his current job if there was going to be a problem. Arzola responded, "Don't worry about it. We know about your background already. So just come on in." Arzola offered Dellorfano the forklift operator position after the interview. Dellorfano held that position throughout his employment.

Kurt Leo Rojo

Kurt Leo Rojo is friends with Tony Nava and Alex Arzola. In 2016, Rojo informed Nava that he was looking for work. Nava suggested that he talk to Alex Arzola. In late September 2016, Rojo went to the Chino facility and filled out an application. Rojo testified that when he initially filled out the application, he checked the "yes" box in response to whether he had ever been convicted of a criminal offense (felony or serious misdemeanor). That same day, Rojo was interviewed by Alex Arzola. Rojo handed his application to Arzola during the interview. Arzola reviewed it and told Rojo to redo his application and to leave the section about his

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other employment-related documents in Correa's personnel file which were all signed by Herrera and/or Correa on around April 28, 2016—the date of his orientation. (Jt. Exh. 4, 12-16, 25-33). In light of this evidence, I find Correa completed his employment application and checked the "no" box regarding his criminal convictions on March 15, 2016, a month before meeting Herrera during his orientation.

[10] In 2014, Dellorfano applied with Respondent to be a forklift operator. At the time, Dellorfano had criminal convictions, but he checked the "no" box when he filled out his application. In June 2014, he was hired to work for New Indy Roll Mill in Ontario, California. The exact relationship between Respondent and New Indy Roll Mill is not clear from the record, but Respondent handled human resource functions for New Indy Roll Mill. Dellorfano testified in around November 2014, then-Human Resource Director, Christi Triay, called him into her office. It was a one-on-one conversation. She had a copy of Dellorfano's application on the table, and she asked him why he had checked "no" when he had prior criminal convictions. Triay explained to Dellorfano that she had received a phone call from his parole officer who told her about Dellorfano's conviction(s). According to Dellorfano, Triay gave him the parole officer's telephone number and a new application to complete. She told him to disclose his prior criminal convictions on the new application. Dellorfano told Triay that some of his convictions were kind of old and he was not sure about their dates, and Triay told him to just write down what he could remember. Triay did not discipline/discharge Dellorfano for failing to disclose his convictions on his initial application. But, in 2015, Dellorfano was terminated when he was a no call/no show for several days after his DUI arrest.

Christi Triay testified she vaguely recalled receiving a call from a parole officer about an employee, but she does not recall who it was about or what she did in response to the call. But she denied she would have taken the steps Dellorfano described. (Tr. 944-948). Although I found Triay to be a largely credible witness, I credit Dellorfano regarding this exchange. His recollection was clearer, logical, and certainly plausible considering what other managers (Danny and Alex Arzola) were saying to applicants about disclosing their criminal convictions at the time.

criminal convictions blank. Rojo did not question Arzola why; he simply completed a new application, leaving the questions about his convictions blank. Rojo initialed the three acknowledgement statements and signed and dated the application. (Jt. Exh. 6, pg. 8). Arzola later hired Rojo. Rojo began working as a day-shift tire technician in early October 2016, and he remained in that position throughout his employment.[11]

Gilbert Sanchez

Gilbert Sanchez is friends with Michael Talbot, and Talbot suggested that Sanchez apply for a job with Respondent.[12] On or around August 16, 2016, Sanchez went to the Chino facility and filled out an employment application. Sanchez has a felony conviction, but when he got to that question, he did not check a box and he did not provide any additional information. Sanchez testified he left the question blank because he wanted to talk to someone (during an interview) about it. Right above the question about criminal convictions, there is question asking, "Are you able to perform the essential functions of the job for which you are applying, either with or without reasonable accommodation?" Sanchez testified he also left that question blank because he did not know what the term "essential functions" meant. Sanchez then completed the rest of the application and gave it to Michael Talbot to submit.

Later, Sanchez interviewed with Alex Arzola. During the interview, Sanchez told Arzola that he was on probation, but that it would not have any effect on his work. Sanchez did not provide Arzola any other information about his conviction(s). Arzola eventually hired Sanchez to work at the Chino facility as a tire technician.

Sanchez reported for work on around October 5, 2016. Arzola told Sanchez that he had misplaced his earlier employment application, and that Sanchez needed to fill out another one. Sanchez asked Arzola if he should leave the question about his prior criminal convictions blank like he did on his first application, and Arzola told him yes, leave it blank. As instructed, Sanchez filled out another application, and he again left the question about his convictions blank. He also left blank the question asking whether he could perform the essential functions of the job with or without reasonable accommodation. He initialed the acknowledgement statements and signed and dated the application. (Jt. Exh. 5, pg. 8). He gave it to Arzola, and Arzola then walked Sanchez and Rojo (who also started that day) over to human resources to meet with Kathleen Moldenhauer. Sanchez testified that someone told him to date the second application the same as the date of his first application (8/16/16), so he used that date throughout the second application. During his meeting with Moldenhauer, she reviewed Sanchez's application and did not say anything about the questions he left blank. She did not

[11] Rojo's application is in the record. The "no" box is checked in response to the question asking whether he had any criminal convictions. (Jt. Exh. 6, pg. 5). Rojo denied checking the box, stating he left it blank. I credit his denial. As stated, Rojo was one of three alleged discriminatees (Talbot and Sanchez) told by the person hiring him to leave the question blank after he disclosed that he had criminal convictions. And, like Talbot and Sanchez, despite leaving the question blank as instructed, the "no" box on Rojo's application was inexplicably marked as of his termination. And while the check mark at issue looks similar to the others on his application, under the circumstances, I credit that Rojo did not check it.

[12] At the hearing, I observed that Sanchez had the word "Mongols" tattooed on his head. He was not questioned about it or whether he was a member of the Mongols Motorcycle Club. As previously stated, I have not relied upon anyone's affiliation with this Club in assessing credibility.

ask, and he did not volunteer, if he had any criminal convictions.[13] Sanchez worked as a night-shift tire technician throughout his employment.

George Garcia

George Garcia began working for Respondent as a driver in around October 2011. At the time of his discharge, Garcia was working as a floater driver, which meant he did not have an assigned route. He typically worked from around 4 or 5 a.m. to around 2 or 4 p.m. He typically received two 10-minute breaks per day, and a 30-minute lunch break.

Garcia testified about his daily routine.[14] Upon arriving at the facility, he went to the dispatchers' office to clock in or handwrite his start time on his timesheet, get his paperwork (e.g., bills of lading) and, if necessary, obtain assistance from a dispatcher to locate his semi-tractor truck and/or trailer in the yard. He typically was assigned the same semi-tractor truck (Truck 4207) each day. He estimated these tasks would take 10-15 minutes a day. He then headed out to his semi-tractor truck and performed a pre-trip vehicle inspection (e.g., check his gauges, tires, lights, etc.). Upon completing the inspection, Garcia drove his truck to his assigned trailer, coupled the truck and the trailer, and then hooked up the airlines and electrical lines. He also inspected the trailer to make sure it was secure and operating correctly. Garcia estimated it would take him, in total, between 1.5-1.75 hours to complete all these tasks. (Tr. 619). If there were issues with the truck or the trailer that could be addressed quickly, he would drive over to the "barn" near the mechanic shop to have the mechanics address the issues. If not, Garcia would notify his dispatcher and be assigned another truck or trailer to use to perform his loads. Garcia then got fuel at the pumps, which would take an additional 15-45 minutes, depending on the number of other trucks in line. He would then head out of the yard to perform his loads for the day.[15]

After performing his loads, Garcia would return back to the Chino facility. He would park his truck and trailer (if he did not drop his trailer somewhere) and perform post-trip inspections of both. Garcia estimated these inspections would take about 45 minutes. If there were any issues, Garcia notified the mechanic shop. He then was to go the dispatcher's office to turn in his paperwork. Garcia would then clock out or handwrite his end time on his timesheet. He did not estimate how long these tasks in the dispatcher's office would take.

[13] Sanchez's application is in the record, and the "no" box is marked in response to the question of whether he had any criminal convictions. (Jt. Exh. 5, pg. 5). Sanchez denied marking the box, stating he left it blank. I credit his denial for the same reasons I credited Talbot's and Rojo's denials. Additionally, I find significant that all but two of the responses on Sanchez's application are marked with an "x." The only ones not marked with an "x" are the two Sanchez testified he left blank: the question about his criminal convictions and the question about whether he was able to perform the essential functions of the job with or without reasonable accommodation. Both of those "no" boxes have a single slash mark ("/"). (Jt. Exh. 5, pg. 5). All of these factors lead me to credit Sanchez that he did not mark the box at issue.

[14] Overall, I do not find Garcia to be a credible witness. He did not impress me as having sincere, forthright, and candid demeanor; his recollection was poor and suspiciously selective; and his testimony was often illogical, self-serving, uncorroborated, and/or undermined by the other evidence.

[15] In contrast, Nick Rendon, Garcia's dispatcher, estimated it takes drivers roughly 30 minutes from when they arrive at the facility to get their truck ready and leave to begin performing their loads. (Tr. 1380). Rendon's estimates are far more reasonable based on the tasks. It does strike me as improbable that it would take an experienced driver 1.75-2.5 hours every day to perform these basic tasks before leaving to perform their loads. Additionally, as discussed below, Garcia's estimates are belied by his own logs.

Drivers are required to use the time clock in the dispatcher's office to clock in and out. There were times Garcia did not use the time clock and would instead handwrite his start and/or end times on his timesheet. Garcia testified that this was permitted. Dispatcher Nick Rendon testified it was not. He also testified that he spoke to Garcia multiple times about it and eventually (as discussed below) issued him a warning for not using the time clock.[16]

The DOT, through the Federal Motor Carrier Safety Administration (FMCSA), regulates the number of hours commercial drivers can spend driving and working per day and per week. To ensure compliance with these regulations, drivers are required to log their hours of service (HOS). A driver's hours are divided into four categories: on-duty (non-driving) time, (on-duty) driving time, off-duty time, and sleeper berth time. Each category is defined in the FMCSA regulations. On-duty time is all time from when a driver begins to work or is required to be in readiness to work until the driver is relieved from work and all responsibility for performing work. This includes, but is not limited to, all time spent: waiting for dispatch; inspecting, servicing, or conditioning the vehicle; loading or unloading the vehicle, supervising, or assisting in the loading or unloading, or in giving or receiving receipts for shipments; and performing any other work in the capacity, employ, or service of a motor carrier. Driving time is all time spent operating a commercial motor vehicle. Sleeper berth time is any time spent inside the sleeper berth (e.g., resting or sleeping). Off-duty time is any time not spent on-duty, driving, or in the sleeper berth. See 49 C.F.R § 395.2.

Respondent requires its drivers complete and submit their logs on a daily basis.[17] Respondent's safety/compliance department monitors and advises if a driver is delinquent in submitting their logs. Garcia and other drivers used their timesheet as their daily log, referred to as timesheet logs. The top portion of the timesheet logs contains areas for the driver to write in their name, employee code, tractor truck number, report time, supervisor's name, location, date, and start and end times for breaks. Below and to the right is an area where the driver is to use the time clock to clock in and out. The middle portion is a blank chart where the driver logs their time and movements throughout the day, including when they arrived at the yard, when they left the yard to begin performing their loads, each location where they stopped (e.g., customers, weigh stations, etc.), when they would arrive/leave each location, the bill of lading number for each stop, the trailer number(s), the odometer reading at each stop, the loading/unloading time, the waiting time, etc. The driver would then record when they returned to the yard and when they left for the day. There also is a section near the bottom to note any issues.

Garcia testified that throughout his employment he regularly failed to timely submit his timesheet logs. Garcia was spoken to about this, but he did not recall ever being disciplined for it. (Tr. 651-652; 735-736). Garcia's personnel file indicates Respondent issued him verbal and

[16] As for the time clock, Garcia testified he handwrote in his start and/or end times usually because the time clock was broken. Although Luis Barragan confirmed there were issues with the time clock during a 2-3 week period in the summer 2016, there were no issues thereafter. Respondent introduced timesheets from other drivers for the dates and times Garcia handwrote in his start and/or end times, and they stamped their times using the time clock. (R. Exhs. 10 and 11). This discrepancy is an example of why I generally found Garcia's testimony to be self-serving, deceptive, and generally unworthy of belief.

[17] In its post-hearing brief, the Union contends the DOT's log requirements did not apply if the driver drives within a 100 air-mile radius of his/her normal reporting location, and Garcia's typical stop in Vernon, California kept him within this100 air-mile radius threshold. (U. Br. 62 citing to Tr. 1329:12-1330:2; See 49 C.F.R. § 395.1(e)). Regardless of what the DOT requires, Respondent requires drivers to submit logs, and Garcia acknowledged he was expected to this on a daily basis. (Tr. 650-651)(656-657).

written warnings, as well as required him to receive additional training, between December 2011 and June 2012, because he repeatedly failed to turn in his logs. (Jt. Exh. 8, pgs. 210-216). When shown the documents, Garcia testified he did not recall the warnings. I do not credit Garcia's denials. Garcia's personnel file also reflects he failed to timely submit his logs for several weeks in 2013. Respondent considered this a significant issue, but the safety/compliance department failed to report the matter for several months. Once reported, Garcia was ordered to submit all of his delinquent logs. However, it does not appear he received further discipline, despite his earlier discipline. (Jt. Exh. 8, pgs. 185-187).

In late 2015, the DOT announced that, effective December 16, 2017, drivers would be required to use an electronic logging device (ELD) to track their HOS. Part of the reason the DOT moved to ELDs is to reduce fatigue by eliminating time inaccuracies or fraud. The accuracy of the paper timesheet logs is dependent on what the driver writes down, whereas the ELDs once turned on automatically track the driver's time, whereabouts, and HOS activities throughout the day. (Tr. 1305-1306).

To facilitate the transition to electronic logs, Respondent began installing Qualcomm ELDs in all of its trucks in January 2016. Respondent provided the drivers with training on how to use the device, and each truck has a laminated placard with basic instructions on how to use the device. If needed, a driver could request and receive additional training. Once trained, Respondent expected the drivers to use the device. The drivers are to log on to the device with their employee code and their tractor truck number. Once logged on, the device begins tracking the driver as being in on-duty (non-driving) status. The driver can use the keypad to input specific pre-trip tasks, such as pre-trip inspection. Once the truck starts to move, the device automatically begins tracking the driver as in (on-duty) driving status. When the driver is no longer driving (but does not log off the system) the device will track that as in on-duty (non-driving) status. The driver can use the keypad to input post-trip tasks, such as post-trip inspections. Once the driver logs off the device at the end of the day, the device considers them as in off-duty status until they log back onto the device. (Tr. 1303-1304). The device also has a global positioning system (GPS) that tracks the location and movement of the truck throughout the day. The GPS feature turns on and off with the truck, regardless of whether driver logs on to the Qualcomm device. Respondent prints out electronic logs (or e-logs) from the device. There are samples of the e-log reports in the record.

Garcia received training on the Qualcomm device, but he claims he only learned how to log on and input his truck and trailer numbers. He also stated there were times when the device would not work correctly. Garcia acknowledged that if the Qualcomm device did not work for some reason, he was required have and use paper logs to track his time. (Tr. 699-700).

Sale of the Business, Theft of Tires, and Termination of Alex Arzola

On September 9, 2016, Tom Lanting and his partners sold Respondent's business to Cedar Rapids Steel Transport (CRST). Lanting signed a contract with CRST to remain president through early 2019. At the time of the sale, Lanting held a meeting at Respondent's corporate office to introduce CRST representatives to his key personnel, including high-level managers from the Chino facility. Although Alex Arzola was a high-level manager at the Chino facility at the time of the sale, Lanting did not invite him to the meeting because Lanting no longer considered Arzola to be a reliable employee, primarily because of Arzola's frequent

absenteeism.[18] The day after the meeting with CRST, Arzola informed Lanting that he no longer had Arzola's loyalty and that Arzola had no loyalty to CRST. (Tr. 1049-1050).

About a month later, on Saturday, October 8, 2016, a trailer containing $80,000 worth of tires belonging to one of Respondent's customers was stolen from the Chino yard. The trailer was parked in the yard over the weekend awaiting delivery the following Monday. (Jt. Exh. 10). Each trailer has a hidden GPS device. Respondent learned from the trailer's GPS device that it had been moved around the yard multiple times and eventually out through an unguarded back exit. Whoever stole the tires removed the hidden GPS device from the trailer and threw it into the bushes. The customer's insurance company hired a third party to investigate. The investigator examined the scene and interviewed Respondent's Safety Director Anthony Lema and Manager James Estrada. On November 2, 2016, the investigator issued a report concluding the theft was likely an inside job. In the report, the investigator noted that Lema agreed that "it was logical to conclude that there was internal involvement." (Jt. Exh. 10, pg. 9). Respondent's insurer paid the customer for the loss.

Following the theft, there were rumors circulating that Alex Arzola and at least one other employee were involved. Jordan Lanting and Kathleen Moldenhauer acknowledged hearing these rumors. Tom Lanting believed that Arzola "orchestrated the whole theft" because nothing happened in the Chino yard without Arzola knowing about it. (Tr. 1015; 1048). Despite these rumors and suspicions, Respondent took no action against Arzola, or any other employee, because there allegedly was no proof. (Tr. 1476; 1483). But there also is no evidence Respondent ever investigated which, if any, employee(s) was involved in the theft. (Tr. 1630).

On December 22, 2016, Respondent terminated Arzola because of his chronic absenteeism.[19] According to Tom Lanting, Arzola's attendance and overall performance were poor in the months prior to the sale to CRST, and they continued to deteriorate after the sale.

Issues with George Garcia's Performance

Following the sale to CRST, little changed at the Chino facility. George Garcia continued working as a floater driver, and he continued to have issues. Prior to the sale, in April, Respondent issued him a warning for damaging another vehicle with his truck and then leaving the scene. Shortly after the sale, Respondent issued Garcia a counseling warning for failing to wear required personal protective equipment. Garcia signed the document on September 15, 2016. (Jt. Exh. 8, pg. 172). On November 1, 2016, Respondent issued Garcia a written warning for not properly clocking in and out using the time clock and for failing to correctly record his breaks on his timesheets. The warning is marked "refused to sign." (Jt. Exh. 8, pg. 173). Garcia testified he did not recall receiving this November 1 warning. (Tr. 751-752).[20]

[18] A month earlier, Danny Arzola was terminated following a physical altercation with an employee.

[19] The parties spent considerable time presenting evidence about Alex Arzola, his employment history, his affiliation with the Mongols Motorcycle Club, his relationship with Tom Lanting, and his final months working for Respondent. Most of the evidence is irrelevant to the allegations, and I have disregarded it.

[20] I do not credit Garcia. According to Dispatcher Nick Rendon, Garcia repeatedly failed to use the time clock to record his start and/or end times and would instead handwrite in times on his timesheet. Rendon told Garcia to stop doing this and to use the time clock, like all the other drivers. Despite these instructions, Garcia continued to handwrite in his time, and Rendon eventually reported this to human resources. A supervisor prepared the November 1 written warning for Rendon to give to Garcia. When Rendon gave it to Garcia, Garcia refused to sign it. Rendon then wrote "refused to sign" on it and gave a copy to Garcia. (Tr. 1369-1371).

Most drivers at the Chino facility would handle three loads a day. According to Operations Manager Luis Barragan, Garcia would usually only handle one or two loads per day. (Tr. 1119-1120). Garcia also had issues with his attendance, where he would call in sick or leave during his shift. According to Moldenhauer, there were times in which Barragan and Nick Rendon contacted her about Garcia. They reported to her about Garcia's absenteeism, his wanting to leave early, and him refusing loads. On November 4, 2016, Nick Rendon sent Moldenhauer an email regarding Garcia. (R. Exh. 14). In this email, Rendon explained a particular situation in which Garcia refused to pick up a load and make a delivery. Garcia told Rendon that there were plenty of other drivers available, and that Rendon should just give the load to another driver. Garcia also told Rendon that he was going to cover his ass (for refusing the load) by saying that he did not feel well, and that he (Garcia) could not do any more work that day. Garcia told Rendon this was nothing new and nothing was going to change or happen to him. Rendon concluded his email by stating the company should take immediate action.

Moldenhauer testified that after she received this email, she had a conversation with Barragan and Rendon, and she informed them that she expected them to administer discipline. She also told them they needed to inform Garcia that they expected him to perform his job like anybody else, and if he did not, they would proceed towards termination. It is not apparent whether these particular issues continued, or whether Rendon or Barragan spoke with Garcia about these issues after this, but no discipline was issued to Garcia between mid-November 2016 and January 2, 2017.

Week of December 26, 2016

Union Meeting

Following Alex Arzola's discharge, a group of non-drivers (Michael Talbot, Matthew Talbot, Mike Garcia, Mark Garcia, Kurt Leo Rojo, and Tony Nava) met in the tire shop break room over lunchtime to discuss contacting the Union about representation. After the meeting, Michael Talbot spoke with Gilbert Sanchez, Ray Correa, and Richard Dellorfano about contacting the Union. At some point, the Union was contacted and a meeting was scheduled for December 27, 2016 at the Union's offices in Rialto, California. According to the sign-in sheet, at least 8 non-driver employees attended the December 27 meeting, including Michael Talbot, Kurt Leo Rojo, and Tony Nava. (G.C. Exh. 9). Union organizer Ramiro Alonzo provided information about the Union, how organizing campaigns work, and the next steps if the employees were interested in moving forward. He also provided them with cards explaining their rights under the Act. A second Union organizing meeting was scheduled for Saturday, December 31, 2016.

Union Flyers

The following day, on December 28, employees began distributing and posting flyers announcing the December 31 Union meeting. On the top of the flyer, there is Respondent's logo. Below was the message: "All Driver's, Yardmen & Mechanics, meeting at Teamsters Local 63. Saturday, December 31st @12 pm. 379 W. Valley Blvd, Rialto. Let's come together 'Live Better, Work Union.'" (Jt. Exh. 11). The Union flyers were put on vehicles in the employee parking lot, in the tire shop, on the parts counter near the mechanic shop, in employee restrooms, in trucks, and out in the yard.

Matthew Talbot was the individual who printed the flyers, and he was one of the individuals who handed the flyers out to employees. There were other employees discussing the Union in the break room at the tire shop. Richard Dellorfano was one of the forklift operators who handled the corrugated cardboard in the back part of the property. He talked

with the tire technicians about the Union flyer, and he took three or four of the flyers with him to give out to the other forklift operators in his area.

Tom Lanting's son, Jordan Lanting, works for Respondent as a Recruiter. As a Recruiter, he is responsible for finding and hiring drivers. His office is located in the office building at the Chino facility. He first learned about the Union flyers on the morning of December 28, when he received a call that someone had left flyers on cars in the employee parking lot. Lanting went out to the parking lot and began removing the flyers from the cars. He later asked Gary Villalobos, a supervisor, about the flyers, and Villalobos told Lanting that the flyers were coming from the tire shop. Lanting then walked over to the tire shop and went into the break room. Michael Talbot, Matthew Talbot, Kurt Leo Rojo, Mike Garcia, and Mark Garcia were all sitting around together in the break room. Gilbert Sanchez and Ray Correa were also present.[21] Lanting greeted the employees and began looking around the room. He looked into one of the open locker/cabinets used by employees to store their clothes and equipment. On the shelf in the locker, there was a stack of Union flyers. According to Michael Talbot, Lanting pulled out one of the flyers and asked those assembled, "what is this about?" Talbot responded to Lanting that it was against the law for him to ask them anything about the Union. Lanting responded that he just wanted to know what it was, and that he wanted to join the Union. Lanting then placed the flyer back into the open locker and said, "All right, you guys have a nice day." He then left the shop. The exchange lasted a few minutes.[22]

After leaving the tire shop, Jordan Lanting went and reported what he found to Human Resources Director Kathleen Moldenhauer in her office. Moldenhauer grabbed her employee handbook and said it was against company policy to distribute anything during working hours. Moldenhauer and Lanting then went to the tire shop to search for the flyers. When they arrived, the flyers were no longer in the locker. Moldenhauer pointed to a locker and asked whose it was. Matthew Talbott responded that it belonged to the tire technicians who worked day shifts. He specifically said it belonged to him, Michael Talbot, and (Kurt) Leo Rojo. Moldenhauer then pointed to the other locker and asked whose it was. Talbot responded it belonged to the night-shift technicians. Ray Correa and Gilbert Sanchez are the two night-shift tire technicians.

Moldenhauer and Lanting then went over to the parts counter which is near the mechanic shop. Mike Garcia, the parts clerk, was there. Moldenhauer asked Garcia if he had placed a flier under the plastic covering on the counter. Garcia responded he had not Moldenhauer then asked, "Was there a flier under the plastic counter?" Garcia responded there was. She then asked who put it there, and Garcia responded he did not know. Moldenhauer informed Garcia that he could not post anything on company property that is not a business document; only company documents can be posted. She then left the parts counter and returned to her office.[23]

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[21] Respondent disputes Ray Correa and Gilbert Sanchez were present because they usually did not begin work until around 2:30 p.m. Several of the tire technicians confirmed that Correa and Sanchez often came in early, prior to the start of their shift. I, therefore, credit the witnesses who recalled that both were present when Lanting asked about the Union flyers.

[22] Jordan Lanting testified he went into the tire shop break room and saw the flyers in the locker. He denies he asked what the flyers were about. But he admits to asking whose locker it was. He testified no one responded, and he did not recall anything else about the conversation. He took a photo of the flyer with his phone before putting it back in the locker. He then left.

[23] At some point on December 28, Moldenhauer contacted Tom Lanting to tell him about the Union flyers. Lanting informed Moldenhauer to contact CRST's legal counsel, which Moldenhauer eventually did.

At some point that morning, Jordan Lanting went into the office area in the mechanic shop. Tony Nava was working in an office inputting work orders. Lanting stood in the doorway to Nava's office with a copy of the Union flyer in his hand. Nava recognized the Union flyer as the same one he saw earlier on a table in the mechanic shop. While standing in the doorway to Nava's office, Lanting was talking to an unidentified individual down the hall, and Lanting said, "It wasn't Tony because Tony is a good guy." (Tr. 447). Lanting then walked away without speaking directly to Nava.

At around noon, Jordan Lanting went to the back part of the property where Richard Dellorfano and the other forklift operators were working. Lanting started looking around where they kept all their paperwork. Dellorfano asked Lanting what was up. Lanting asked Dellorfano whether he had seen a Union flyer, and Dellorfano told him he had. Dellorfano then asked Lanting about the Union, what was it about, and what did it do. Lanting responded, "They don't help us. We don't need them." Lanting then got in his truck and left.[24]

Suspension and Recall of Employees for Violating No-Solicitation Policy

In the early afternoon of December 28, Respondent suspended Mike Garcia, Matthew Talbot, Michael Talbot, Mark Garcia, and Kurt Leo Rojo for distributing flyers on company property, in violation of Respondent's no-solicitation policy.[25] Later that day, Moldenhauer called each of them and told them they should return to work the following day and report to human resources before the start of their shift.

The following morning, on December 29, the five men reported to human resources at around 8 a.m. They were called into a meeting with Tom Lanting, Kathleen Moldenhauer, and two other supervisors.[26] Lanting spoke during this meeting. He apologized for sending the men home the day before, and he assured them they would all get their full wages for the day. He also said that as long as they were all doing their jobs everything would be fine.[27] Moldenhauer reminded the employees about the no-solicitation policy, and then she released them to work.[28]

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[24] In the days after discovering the Union flyers, Jordan Lanting went out into the yard, specifically into the tire shop, about two or three times a day. He testified he did this "just to keep an eye on things" and "[s]ee how everything was going." (Tr. 1208-1209).

[25] Section 5.12 of the employee handbook states "employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during work time unless it is pre-authorized by management." The policy further states that "[e]mployees who are not on working time (e.g., those on meal period or rest breaks) may not solicit employees who are on working time for any cause or to distribute literature of any kind to them. Furthermore, employees may not distribute literature or printed material of any kind in working areas at any time." (R. Exh. 22, pg. 36). There are no allegations regarding the policy or the suspensions.

[26] Michael Talbot and Kurt Leo Rojo testified about this meeting. Rojo testified about additional, negative comments Lanting allegedly made about the Union, which Talbot did not corroborate. I, therefore, do not credit Rojo's testimony regarding those additional comments.

[27] Lanting testified he does not recall this meeting. But he did confirm it was his decision to bring the men back and pay them their full wages for the day. However, his explanation was evasive, circular, and largely non-responsive. It also exemplifies the type of answers he gave throughout his testimony that led me to conclude that he was generally not a credible witness:

> Q: BY MS. ORTEGA: Okay. So what information did you learn from the time that you initially spoke with Kathleen and you wanted to send them home, to the time you made the decision to pay them for being sent home. Was there any new information that you learned?

Conversation Between George Garcia, David Ceja, and Nick Rendon

George Garcia testified that a few days before the December 31 Union meeting, he went to the dispatchers' office at the start of his shift to clock in and get his paperwork for the day. (Tr. 647-649). Garcia's timesheets for the week in question were not introduced into evidence, but he testified that he "mostly" clocked in at around 4 a.m. (Tr. 558-559). Garcia testified that when he arrived in the office dispatchers David Ceja and Nick Rendon were in the office, near their desks which are close to one another. Ceja was Garcia's former dispatcher, and Rendon was Garcia's current dispatcher. According to Garcia, Ceja asked him if he had planned on attending the Union meeting. Garcia responded, "I think so." Ceja then said, "Be careful, you might not have a job when you get back." Rendon also said, "Yeah, because you might not have a job when you get back." Garcia replied, "We'll see." (Tr. 649-650). Garcia testified there were others around during this conversation, including a Dispatcher named Mike _____. Rendon and Ceja both denied making these statements.[29]

A: Got to be for -- the payroll was done the next time, so I don't know. You'd probably have to ask Kathleen. She would know that.
Q: Okay, so there was no new information concerning the fliers -- the conduct surrounding the fliers that led you to make the decision to --
A: No. Not at all.
Q: -- pay them for back wages?
A: No.
Q: Okay. Did you feel that that was the correct thing to do?
A: I don't know if it was the correct thing to do, I just, you know, guys head home and until we got it figured out, Kathleen and I said we probably should pay them.
Q: Okay. What did you need to figure out?
A: Well figure out what it all detailed. They sent a man home. The man has a family at home. Everybody that works for me lives on paycheck to paycheck, most of them. So as you rob or send someone home for something, you rob them. And that was a decision I made, right or wrong, I made a decision that we will pay them.
Q: And I'm just trying to understand, what details? What information were you trying to get at that point?
JUDGE GOLLIN: Are you -- are these based on concrete answers in your head, or are you just -- do you have an understanding, as far as why you made the decision?
THE WITNESS: No. I don't. I really don't know. I just I made the decision.

(Tr. 1082-1083).

[28] The Union requests that I draw an adverse inference from Respondent's failure to question Moldenhauer about the decision to suspend/recall/pay these employees, or the contents of the meeting. It is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call or question a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). However, the Board has acknowledged that an adverse inference is appropriate if the testimony relates to a material fact. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). In this case, there is no allegation the suspension/recall/payment of these employees violated the Act, and the Union has failed to identify what material fact Moldenhauer would have testified to if questioned. As such, without more, I decline to draw an adverse inference.

[29] I do not credit Garcia. Based on the evidence, I conclude the three of them could not have been together at the start of his shift a few days prior to the December 31 Union meeting. First, Ceja was on a family vacation in Texas from December 25, 2016 through January 3, 2017. Ceja credibly testified as to his whereabouts, and his supervisor, Luis Barragan, confirmed Ceja was gone on vacation. Respondent also introduced Ceja's vacation request and timesheet for the days at issue, as well as the emails from the website he used to purchase his plane tickets, confirming that David Ceja was ticketed to be

Saturday Overtime

Respondent typically has Saturday overtime for its Chino non-driver employees. In late December 2016, Respondent put up postings informing employees there would be no overtime on Saturday, December 31. Later, after the flyers announcing the Union meeting began circulating, employees were told there would mandatory overtime on December 31.[30] Several employees were upset because they made plans to go out of town for New Year's Eve.

Mandatory Meeting

On around December 30, Respondent held a managers' meeting to distribute and discuss guidelines provided by legal counsel about what to do and not do during a union organizing campaign. Respondent then held a mandatory meeting for its tire technicians, mechanic shop employees, forklift employees, and yardman in the conference room in the mechanic shop. Drivers were not included. Tom Lanting, Kathleen Moldenhauer, and Manager Rick Milner spoke at the meeting.[31]

Tom Lanting was the primary speaker. He began by introducing himself and talking about the company. He made reference to being a second-chance company or of giving employees second chances. He did not care about people's background or what they did outside of work. All he was concerned with was that employees worked hard and did a good

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passenger on a December 25, 2016 American Airlines flight from Ontario, California to Dallas/Fort Worth, Texas, and ticketed to be a passenger on a January 3, 2017 American Airlines flight from Dallas/Fort Worth, Texas to Ontario, California. (R. Exh. 16 and 17).

The General Counsel and Union point out that Ceja's paycheck reflects he received salary pay, as opposed to vacation pay, for the week of December 25 through December 31, 2016, which they argue establishes Ceja was, in fact, at work. (R. Exh. 27). Respondent's payroll administrator, Kellie Holguin, explained this discrepancy. She testified that although Ceja submitted his vacation request, his request was not approved by Barragan until after Ceja returned from vacation. (R. Exh. 28). Because of the delay, Ceja's approved request was not submitted to human resources in time for the week at issue to be paid as vacation time. Holguin confirmed that in the absence of an approved request, she classified Ceja's time from December 25 through December 31, 2016 as regular salary pay, and then, after later receiving the approved absence request, she allocated the vacation pay over the next two weeks, even though Ceja was back at work for a portion of those two weeks. I found Holguin to have sincere and honest demeanor, and her explanation was logical, plausible, and consistent with the other evidence.

Second, Garcia's start time was mostly around 4 a.m. (Tr. 558-559). Rendon's start was around 7 a.m. And while there were times Garcia came in later or remained in the yard for an hour or more after he started work, his timesheets show he usually was on the road well before 7 a.m. While scheduling irregularities certainly can occur, I am unwilling to conclude such an irregularity occurred here, particularly when the evidence clearly disproves that Ceja was with Rendon at the time of these alleged threats.

The General Counsel requests that I draw an adverse inference from Respondent's failure to question Seth McMullan about this alleged conversation and about his knowledge regarding the discussion of the Union flyer in the dispatcher's office. The General Counsel alleges but failed to prove McMullan is a Section 2(13) agent. The only evidence is that he is a Dispatcher, and Ceja and Rendon are Dispatchers and admitted Section 2(13) agents. Regardless, there was no testimony McMullan was present during this alleged exchange with between Ceja, Rendon, and Garcia, or that he was present when the Union flyer was discussed. As such, I decline to draw an adverse inference.

[30] There are no allegations regarding the changes in the December 31 overtime.

[31] Several witnesses testified about this meeting and they had different recollections about what was said. The following findings are the credited portions of their testimony, which I found to be the most logical, plausible, and consistent overall. I have discredited the rest as inconsistent and uncorroborated.

job. If they did that, they had nothing to worry about regarding their job. Lanting then discussed the Union and the upcoming meeting. He stated he understood there was information going around about the Union and that there was a meeting on Saturday. He stated he was not for the Union, and he either stated he did not believe the employees needed the Union or did not need a third party between them. At some point, there was a question about whether the December 31 overtime was mandatory. Lanting answered that there was plenty of work to do and overtime was available if people wanted to work, but it was not required. He stated that if employees had to go to the Union meeting, or if they had somewhere else to go, they could.

Conversation Between Tom Lanting and Tony Nava

Nava testified he attended two meetings with Tom Lanting in late December 2016. The first was the mandatory meeting described above, and the second occurred outside the human resources building. (Tr. Tr. 448-450). Manager Walter Ramirez told Nava to come to the human resources building for a meeting with Tom Lanting. Nava waited for Lanting outside the building. Lanting eventually came out and said to Nava, "Tony, I hear you want to climb the ladder here at Gardner." Nava responded by saying, "Yes. I would like to do that one day." Ramirez said to Lanting, "I would like to keep Tony where he's at now … inputting work orders in the computer and I would also like to put him back overseeing the yard because I need him because he does a good job." There was a discussion about what Nava's new duties would be. Lanting then put his hand out and said, "Tony, do I have your loyalty?" And Nava said, "I never planned on leaving Gardner Trucking." They then shook hands. Thereafter, Nava assumed additional responsibilities overseeing work performed out in the yard. Lanting recalled having a conversation with Nava in which Nava expressed interest in a promotion with Respondent, but Lanting denied ever asking Nava if he had his loyalty or offering Nava a promotion or any additional duties or responsibilities.[32]

[32] I found Tom Lanting's demeanor was guarded, defensive, and he appeared less than forthright. His testimony was often evasive, inconsistent, and non-responsive. For example, when asked whether Walter Ramirez introduced him to Nava, Lanting testified, "I remember Tony coming up to me…And he just told me he's a great guy, and he'd like to move up in the company. And then I think Kathleen [Moldenhauer] introduced me to him. And Walter [Ramirez] introduced him to me." (Tr. 1026). A few moments later, Lanting was asked whether he remembered Ramirez saying something to the effect that Nava wanted to climb the ladder, and Lanting said, "I remember something – that's what I said earlier is that he wanted to move up in the company and get into more management." (Tr. 1028). On cross-examination, Lanting was asked whether Nava actually said that he was a great guy, or did that come from someone else, and Lanting responded, "No, he came up after the meeting with the mechanics and he came up and he was with either Kathleen or someone else, and he said he told -- I can remember him telling me, I'd like to move up to management. I'd like to do this. I'm a good guy. He [was] just selling himself to me." Lanting was asked whether prior to that did Ramirez ever say anything to him about Nava, and Lanting testified, "I think it was Kathleen said something to me about him … [t]hat he seems like a really good guy and he looks like he'd be a good candidate to move up." (Tr. 1085). I find it far more probable that Ramirez, someone who directly observed Nava's work on a regular basis, commented to Lanting about Nava being a good candidate to move up, as opposed to Moldenhauer. Furthermore, while Lanting testified he did not discuss or offer Nava a promotion during this conversation, Moldenhauer confirmed that Nava became the lead man of the tire technicians and yard men, and the following day she instructed him to inform them that overtime on Saturday was not mandatory. (Tr. 1638; 1690-1691).

December 31, 2016

Union Meeting

On December 31, 2016, at around noon, the Union held its second informational meeting at its offices in Rialto, California. Several of Respondent's employees attended this meeting, including George Garcia and Michael Talbot. Union organizer Ramiro Alonzo led the meeting, and he provided the employees with information about organizing. The Union had a sign-in sheet for employees to sign indicating that they attended the meeting.

The following week, when employees returned to work, there were discussions about who attended the December 31 meeting. Barragan testified ‘‘everybody was saying the whole shop was there, a few drivers were there." (Tr. 1186). He testified George Garcia was one of the drivers he learned attended the meeting. (Tr. 1159)).

Conversation Between Tony Nava and Tom Lanting

Tony Nava worked on December 31. Nava testified that, at some point during the day, Tom Lanting came into his office in the shop and asked, "How many tire guys showed up to work today?" Nava responded that one or two had. Lanting said, "The tire shop makes you look bad. If the new owners were to come in here today, they'd fire you." Lanting said, "If you don't like these tire shop guys, just go to HR, lie to them, tell them they threatened you." Lanting then said, "I have lunch with judges, police officers, district attorneys. Who do you think they're going to believe, me or these tire shop guys? I'm the meanest person, Tony, you ever want to meet. I love animals more than people." Nava said nothing in response to these statements. That was the end of the conversation. Lanting denied or does not recall making these statements.[33]

Conversation with Dellorfano and the Lantings

Richard Dellorfano also worked on December 31. At around 3 p.m., Dellorfano finished working, and he was walking by the tire shop when he saw Tom and Jordan Lanting. He walked past them on the way to his car. Tom Lanting asked Dellorfano if he was heading home. Dellorfano said that he was. Dellorfano said he had wanted to make it to the Union meeting, but he was too late because he did not make it out on time. Dellorfano then asked them, "What exactly does the Union do?" Tom Lanting responded, "[A]ll they do is do what you can do for yourself. You can ask questions that they ask. All they do is take your money from you." (Tr. 813). Dellorfano did not say anything in response, and the conversation ended.[34]

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[33] I credit Nava. Lanting initially testified he could not remember if he was at the Chino facility on December 31, and then testified he really did not believe that he was there. (Tr. 1030; 1070). However, two employees (Dellorfano and Nava) separately recalled speaking with him that day. Additionally, at the mandatory meeting, Lanting told the employees that overtime on December 31 was voluntary. They could choose to work, or they could choose to go to the Union meeting. I find Lanting went to the Chino facility on December 31 to see which employees showed up for work and, by process of elimination, which employees may have gone to the meeting. Also, Lanting's statements to Nava that afternoon reflect his hostility toward those employees he believed went to the meeting, as well as his desire that his new lead man facilitate their terminations by lying to human resources that they threatened him.

[34] I credit Dellorfano. Tom Lanting testified he did not recall being at the Chino facility or talking to Dellorfano on December 31. (Tr. 1029). As previously stated, I do not credit Lanting. Jordan Lanting was not questioned about December 31 during his direct examination, and Respondent objected on that basis when the Counsel for General Counsel tried to question him about it during cross-examination. (Tr.

Suspension of George Garcia

On January 3, 2017, during a weekly telephonic safety meeting, Kathleen Moldenhauer learned that George Garcia was receiving discipline for failing to turn in his logs.[35] Later that day, Garcia was in the human resource offices talking to another representative about an FMLA issue. Moldenhauer heard Garcia and called him into her office. Moldenhauer obtained the warning from the compliance/safety department and then presented it to Garcia. It was a one-on-one conversation in Moldenhauer's office. The warning was originally marked as a "final warning" for failing to turn in his logs December 20-30, 2016. Attached to the warning were a number of weekly e-logs showing days that Garcia worked but had failed to turn in timesheet logs. (Jt. Exh. 8, pg. 166). Each had a different recollection of the conversation that followed.

According to Moldenhauer, she handed Garcia the final warning, and he "took exception to it being a final warning." Moldenhauer then pulled Garcia's personnel file and went through his prior discipline with him, including an April 14, 2016 written warning he received for damaging a car while driving and then leaving the scene, a September 15, 2016 counseling/warning he received for failing to wear personal protective equipment, and a November 1, 2016 warning he received for failing to clock in/out and not filling in his breaks and lunches on his timesheet. Moldenhauer testified that after talking with Garcia she decided to reduce the final warning and three-day suspension to a written warning and one-day suspension, with the understanding that Garcia would return from his suspension and begin submitting his completed logs in a timely manner. Moldenhauer testified she made the change in an effort to get Garcia to correct his behavior. She noted the changes on the form and gave it to Garcia. Garcia then left.

1244-45). The General Counsel requests that I draw adverse inferences against Respondent for failing to question Jordan Lanting regarding his conversations with Dellorfano on December 28 and 31. Under the circumstances, I find Respondent's failure to question Lanting regarding these topics supports drawing an adverse inference. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). As stated, I credit Dellorfano on both conversations.

[35] Respondent's Driver Job Performance Disciplinary Process identifies Level 1 Correction and Level 2 Correction situations. Level 1 Correction includes, but is not limited to: failure to secure cargo, failure to use personal protective equipment, misuse of company equipment, use of electronic devices while operating company vehicle, falsification of driver logs, hours of service violations, identifiable mechanical violations, commercial license and medical certification issues, any active hostility, misconduct, or willful disregard for company policy, and acts of indifference, carelessness, or dishonesty. A first offense can result in a written warning and loss of safety bonus, and/or suspension for one business day. A second offense can result in a final written warning and loss of safety bonus, suspension for up to three business days, required attendance at trucking school, and mandatory installation and monitoring of vehicle mounted camera. A third offense could result in further disciplinary action, up to and including termination of employment. A Level 2 Correction includes all other company rules not listed or otherwise implied as Level 1 Correction (aside from attendance issues). The steps for Level 1 Correction are as follows: (1) documented counseling; (2) documented verbal correction; (3) a written warning, additional training, and a one-day suspension; (4) a final written warning and up to a 3-day suspension; and (5) further disciplinary action, including termination of employment. All written corrections are active for 12 months from issuance. If the employee does not receive an additional violation within 6 months from issuance, he/she will drop one stage in the progressive process. If the employee does not receive an additional violation within 12 months from issuance, progressive discipline restarts. (Jt. Exh. 13).

According to Garcia, Moldenhauer started by telling him he was receiving a warning and three-day suspension. She then handed him a September 15, 2016 warning for failing to wear his protective safety vest and boots and a November 1, 2016 written warning for failing to clock in/out and not filling in his breaks and lunches on his timesheet. Garcia told Moldenhauer that these were old write-ups. He asked how she was going to suspend him (under the company's progressive disciplinary policy) if he never got a verbal or written warning. He also informed her that he recently received a safety bonus, and he would not have received a safety bonus if he had current discipline in his file. Garcia then told Moldenhauer that "the real reason we are here (in this disciplinary meeting) was because I attended a Union meeting." (Tr. 675-676). [Moldenhauer denied that Garcia made any reference to the Union during her conversations with him.] At the end of the meeting, Moldenhauer brought up the Qualcomm device in Garcia's truck, and she asked him why he did not have it on during his work day. Garcia explained the Qualcomm stops when the truck is not moving, like when he is getting fuel, performing pre and post trip inspections, and other tasks. Moldenhauer then showed Garcia "some graphs or something" and gave him the January 3 warning for failing to submit his driver logs. She reduced the warning from a final warning to a written warning, and the three-day suspension to a one-day suspension. Garcia then left.[36]

There is no dispute Garcia failed to timely submit his logs for the days at issue.

[36] I credit Moldenhauer over Garcia. I found her recollection to be clearer and far more logical, plausible, and consistent with the documentary evidence. I credit she met with Garcia on January 3 to issue him the warning/suspension for failing to turn in his logs. It was not, as Garcia contends, to reissue him old write-ups. She only brought out his earlier discipline when he questioned how he could be suspended without previously receiving verbal and written warnings.

I also credit Moldenhauer that Garcia never mentioned the Union or the Union meeting during the suspension meeting. As previously stated, I did not find Garcia to be a credible witness. His recollection was selective and testimony self-serving. Additionally, the timing and manner in which he testified about events undermined his credibility. For example, the parties took a lunch break during Garcia's direct examination. Prior to the break, Garcia testified about this exchange with Moldenhauer regarding the basis for his suspension, and there was no mention of the Union or Union meeting. He then began testifying that Moldenhauer asked him about the Qualcomm device and showing him the GPS print-outs from the days in question. The parties then broke for lunch. After the break, Counsel for General Counsel led Garcia back over his earlier testimony, and it was then that Garcia recalled telling Moldenhauer the real reason he was being disciplined was because he went to the Union meeting:

> Q: Okay. All right. So I'm just trying to set the scene and remind you where we were, because 45 minutes has passed. We took a 45-minute break.
> All right, so now you're back in this room and you're talking to her about your safety bonus. Did you mention anything else to Kathleen Moldenhauer at this time?
> A: Yeah, I mentioned also, besides my safety bonus is that the real reason that we're here is because I attended a Union meeting. That -- that's the real reason why we're here and that it's nothing personal. I just wanted to make a better for my fam- -- for myself and my family and I still got the suspension.
> Q: Okay. All right. When you mentioned the real reason why we're here is because of the Union meeting, did she respond?
> A: She didn't really give a response at that time as far as me saying that the real reason we're here is for the Union meeting, is because I attended the Union meeting. No, she didn't.

(Tr. 675-676).

Termination of George Garcia

Following her January 3 meeting, Moldenhauer notified Barragan about Garcia's one-day suspension. Barragan asked Moldenhauer what she was going to do about Garcia's attendance issues. Moldenhauer stated she would conduct an audit of Garcia's timesheets. According to Barragan, Respondent was performing audits on all of its employees. Managers were instructed to forward the names of five employees per week per area so that human resources could conduct the audits. (Tr. 1135).

Following her conversation with Barragan, Moldenhauer requested Garcia's timesheets from payroll and his electronic logs from safety/compliance for a four-week period of time (November 27, 2016 and December 24, 2016). She then compared the data and ultimately concluded that there were disparities between the two totaling 74.75 hours. (R. Exh. 21).[37]

Garcia worked 19 days during this period of time. The following is a comparison of Garcia's handwritten timesheets and the electronic logs in his truck for 12 of those 19 days.

On November 28, there was a discrepancy of 1.75 hours between Garcia's timesheet and his electronic log from the Qualcomm device on his truck. The timesheet reflects he clocked in and started working at 4 a.m., and he began driving from the Chino facility at 5 a.m. He performed his loads and returned to the facility at 2:30 p.m., and he hand wrote his end time as 3:30 p.m. He was paid for 10.75 hours. His electronic log shows that he did not log on to the Qualcomm device until 5:34 a.m., and did not start driving until 5:56 a.m. He returned to the Chino facility at 2:26 p.m., and he logged off at 2:32 p.m. He had 5 hours and 26 minutes of driving time, and 3 hours and 32 minutes of on-duty time, for a total of 8 hours and 58 minutes of work time.

On November 30, there was a discrepancy of 4 hours between Garcia's timesheet and his electronic log. The timesheet reflects that he clocked in and started working at 4:00 a.m., and he left the Chino yard at 4:45 a.m. He performed his loads, and he returned to the Chino facility at 2:00 and handwrote his end time as 2:30 p.m. He was paid for 10.25 hours. His electronic log shows he did not log on the device until 5:42 a.m., and he did not leave the Chino

[37] The combined records reflect Garcia worked November 28, 29, 30, and December 1, 2, 6, 7, 8, 9, 12, 15, 16, 18, 19, 20, 21, 22, 23, and 24 during this four-week period of time. According to her chart, Moldenhauer found one day when Garcia's timesheet and log matched up (December 12), and one day where the discrepancy was less than one hour (December 6). There are 5 days for which Garcia either completed a timesheet or there is an electronic log, but not both. For example, on November 29 and December 20, Garcia's electronic logs reflect that he worked (8.5 hours and 5.5 hours, respectively), but he apparently did not fill out a timesheet for either day. Moldenhauer did not include the discrepancies for these two days on her chart. Conversely, on December 2, 7, and 16, Garcia completed timesheets reflecting he worked (8.75 hours, 10.75 hours, and 10.75 hours, respectively), but the electronic logs show he was off duty the entire day. For these three days, Garcia either failed to log on to his Qualcomm device, there was a technical issue with the device, or he performed no work. Although Garcia testified he had difficulty at times using the Qualcomm device, his logs during this four-week period--with the exception of December 8 and 9 when he failed to log out--do not indicate he had any issues with the Qualcomm device. Furthermore, if he had issues, he was to notify management and note the issue(s) on a timesheet log. There are timesheet logs for other days in which Garcia noted he had issues with the truck or trailer. There is nothing on Garcia's timesheet logs, or on any other document, indicating he had any issues with the Qualcomm device on any of the days at issue. Moldenhauer did include the discrepancies for these three days on her chart.

yard until 6:00 a.m. The electronic log shows that he returned to the Chino facility by 11:52 a.m., and he turned off the truck and device for the day at 11:57 p.m. He had 4 hours and 24 minutes of driving time, and 1 hour and 51 minutes of on-duty time, for a total of 6 hours and 15 minutes of work time.

On December 1, there was a discrepancy of 1.75 hours between Garcia's timesheet and his electronic log. The timesheet shows that he clocked in and started working at 4:00 a.m., and he left the Chino yard at 5:15 a.m. He performed his loads and returned to the facility at 2:15 p.m. and handwrote his end time as 2:30 p.m. He was paid for 10 hours. His electronic log shows he did not log on to the device until 5:23 a.m., and he left the Chino facility at 5:37 a.m. He returned to the Chino facility at 1:31 p.m., and logged off for the day at 1:41 p.m. He had 4 hours and 27 minutes of driving time, and 3 hours and 51 minutes of on-duty time, for a total of 8 hours and 18 minutes of work time.

On December 8, there was a discrepancy of 2.25 hours between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote in his start time as 4:00 a.m., and he left the Chino yard at 5:15 a.m. He performed his loads and returned to the facility at 12:45 p.m. and handwrote his end time as 1:00 p.m. He was paid for 8.5 hours. His electronic log shows that he did not turn on the Qualcomm device until 6:00 a.m., and he left the Chino facility at 6:05 a.m. He returned to the Chino facility at 12:01 p.m., and then failed to log off. He had 3 hours and 22 minutes of driving time, and 2 hours and 46 minutes of on-duty time, for a total of 6 hours and 8 minutes of work time.

On December 9, there was a discrepancy of 1.75 hours between Garcia's timesheet and his electronic log. The timesheet shows that he clocked in at 4:04 a.m., and he left the Chino yard at 5:00 a.m. He performed his loads and returned to the facility at 1:15 p.m., and he clocked out at around 1:30 p.m. He was paid for 9.25 hours. His electronic log shows that he did not turn on the Qualcomm device until 5:51 a.m., and he left the Chino facility at 6:06 a.m. He returned to the Chino facility at 1:04 p.m., and then logged off for the day at 1:28 p.m. He had a total of 4 hours and 12 minutes of driving time, and 3 hours and 25 minutes of on-duty time, for a total of 7 hours and 37 minutes of work time.

On December 15, there was a discrepancy of 4 hours between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote his start time as 4:00 a.m., and he left the Chino yard at 5:00 a.m. He performed his loads and returned to the facility at 3:00 p.m. and handwrote his end time as 3:45 p.m. He was paid for 11.25 hours. His electronic log shows that he did not turn on the Qualcomm device until 5:37 a.m., and he left the Chino facility at 6:33 a.m. He returned to the Chino facility at 12:24 p.m., and then logged off for the day at 12:51 p.m. He had a total of 3 hours and 51 minutes of driving time, and 3 hours and 23 minutes of on-duty time, for a total of 7 hours and 14 minutes of work time.

On December 18, there was a discrepancy of 4 hours between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote his start time as 5:00 a.m., and he left the Chino yard at 5:45 a.m. He performed his loads and returned back at the facility at 10:00 a.m. and handwrote his end time as 10:30 a.m. He was paid for 5.5 hours. His electronic log shows that he did not turn on the Qualcomm device until 8:10 a.m., and he left the Chino facility at 8:10 a.m. He returned to the Chino facility and then logged off for the day at 11:31 a.m. Throughout the morning, there were several recorded off-duty times, totaling more than 1.75 hours. He had 1 hour and 26 minutes of driving time, and no on-duty time, for a total of 1 hour and 26 minutes of work time.

On December 19, there was a discrepancy of 1 hour between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote his start time as 5:00 a.m., and he left the Chino yard at 5:45 a.m. He performed his loads and ended back at the facility at 10:00 a.m. and handwrote his end time as 10:30 a.m. He was paid for 9 hours. His electronic log shows that he did not turn on the Qualcomm device until 5:37 a.m., and he left the Chino facility at 6:24 a.m. He returned to the Chino facility at 1:21 p.m., and then logged off for the day at 1:25 p.m. He had 5 hours and 16 minutes of driving time, and 2 hours and 32 minutes of on-duty time, for a total of 7 hours and 48 minutes of work time.

On December 21, there was a discrepancy of 1.5 hours between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote his start time as 4:00 a.m., and that he left the facility at 5:00 a.m. He performed his loads and returned back to the facility at 4:30 p.m., and he clocked out at around 4:45 p.m. He was paid for 12 hours. His electronic log shows that he turned on his Qualcomm device at 5:52 a.m., but he did not leave the Chino facility until 7:05 a.m. He returned to the facility at 3:53 p.m., and he logged off for the day at 4:27 p.m. He had a total of 5 hours and 53 minutes of driving time, and 4 hours and 38 minutes of on-duty time, for a total of 10 hours and 31 minutes of work time.

On December 22, there was a discrepancy of about 9.25 hours between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote his start time as 4:00 a.m., and that he left the facility at 5:00 a.m. He performed his loads and returned back to the facility at 3:15 p.m., and he handwrote that he ended at 3:30 p.m. He was paid for 11 hours. His electronic log shows that he turned on his Qualcomm device at 5:55 a.m. He then for the next 1 hour 44 minutes he alternated between internals of driving status (8 minutes, 23 minutes, 10 minutes, and 10 minutes) and intervals of off-duty status (3 minutes, 44 minutes, and 6 minutes). At 7:39 a.m., Garcia went on off-duty status for 2 hours and 35 minutes at or around the Chino facility. His handwritten timesheet reflects that he was in and around Vernon, California during this period of time. At 10:14 a.m., he alternated between intervals of driving status (12 minutes, 10 minutes, and 25 minutes) and intervals of off-duty status (8 minutes and 29 minutes). He then returned to the Chino facility and logged off at 11:38 a.m. He had 1 hour and 38 minutes of driving time, and no on-duty time, for a total of 1 hour and 38 minutes of work time.

On December 23, there was a discrepancy of 7 hours between Garcia's timesheet and his electronic log. The timesheet shows that he handwrote his start time as 4:00 a.m., and that he left the facility at 6:00 a.m. He performed his loads and returned back to the facility at 12:45 p.m., and he handwrote that he ended at 1:45 p.m. He was paid for 9.25 hours. His electronic log shows that he turned on his Qualcomm device at 6:37 a.m. He then for the next two hours he alternated between internals of driving (10 minutes, 13 minutes, 13 minutes, 10 minutes, and 27 minutes) and intervals of off-duty status (15 minutes, 4 minutes, 10 minutes, 10 minutes, and 9 minutes). At 8:39 a.m., he drove for 1 hour and 8 minutes and then returned to the Chino facility and logged off at 9:47 a.m. He had 2 hours and 21 minutes of driving time, and no on-duty time, for a total of 2 hours and 21 minutes of work time.

On December 24, there was a discrepancy of 5.5 hours between Garcia's timesheet and his electronic log. The timesheet shows he handwrote his start time as 5:00 a.m., and he left the facility at 7:00 a.m. He performed his loads and returned back to the facility at 11:30 a.m., and he handwrote that he ended at 12:30 p.m. He was paid for 7 hours. His electronic log shows he turned on his Qualcomm device at 8:58 a.m. He then spent the next nearly 3 hours alternating between internals of driving (21 minutes, 7 minutes, 16 minutes, 10 minutes, and 30 minutes) and intervals of being off-duty (9 minutes, 19 minutes, 52 minutes, and 8 minutes). He

then returned to the Chino facility and logged off at 11:50 a.m. He had 1 hour and 24 minutes of driving time, and no on-duty time, for a total of 1 hour and 24 minutes of work time.

Moldenhauer concluded from her review that the disparities were because Garcia was falsifying his timesheets and writing down time he was not working. This was a dischargeable offense, and Moldenhauer decided she would meet with Garcia to go over the audit and get his explanation. On January 5, 2017, Garcia returned to work from his one-day suspension. Upon arriving to work, he was told by his dispatcher that he needed to go and meet with Moldenhauer. Garcia waited for Moldenhauer to arrive to work. He then met with her and Selena Herrera in Moldenhauer's office.[38] Garcia and Moldenhauer again had different recollections of what occurred at this meeting.

According to Garcia, Moldenhauer began the meeting by stating she needed to talk about his timesheet and the Qualcomm. She presented him with his time sheets and the print outs from his Qualcomm logs (which show general location of truck throughout the day and when the location changes). She asked him "Can you tell me why there's some discrepancy between the Qualcomm and the timesheet? Can you explain to me why you're stealing -- why you're cheating on your timesheet?" Garcia denied cheating on his timesheet. Moldenhauer then provided him with his timesheets and his e-logs, and she again asked him why he was cheating on his timesheets. According to Garcia, he responded that "This is about the Union meeting. This isn't about -- this isn't even about this. It's about the Union meeting. It's bigger than both of us …" He also told her he understood that she was only doing what her superior told her to do. At that point, Moldenhauer got upset, slammed her hands down on the desk, and said, "I don't appreciate the accusations." Garcia then said, "I wasn't accusing you. I'm just stating a fact that we both know it's not about the timesheets or anything, it's about me going to this Union meeting." And Moldenhauer then said, "We're just going to go ahead and terminate your employment," and she gave him his termination notice to sign.

According to Moldenhauer, she confronted Garcia with his timesheets and his e-logs. She started doing through them for each day, comparing the entries on his timesheets with the e-logs. When she came across a discrepancy, Garcia would provide an excuse. He would say that sometimes he had to go and look for his semi-tractor truck or for his trailer. She responded the trucks and trailers have GPS, and they could be located by the GPS tracking. Garcia also said sometimes he had to get fuel. She also pointed out that he was not writing any of that down on his timesheet. Moldenhauer then continued to go through several more, and Garcia had no explanation. At some point, Garcia said, "Well, I'm going to tell you, I get to work and I see other people, and I start talking to the guys, and you know, yeah, I'm out bullshitting, and so sometimes time passes." Moldenhauer said that she was not specifically looking at one certain day. She said she can deal with 30 minutes here and there, but they were talking about a lot of time. Garcia did not have much else to say. Moldenhauer then told him that they were going to terminate his employment and they would have the paperwork and final paycheck prepared

[38] The General Counsel requests I draw adverse inferences against Respondent for its failure to question Selena Herrera regarding the January 3 suspension and January 5 termination meetings. I decline to do so. The General Counsel subpoenaed Herrera to testify at the hearing but did not call her as a witness. On cross-examination of Herrera, the General Counsel attempted to question Herrera regarding Garcia's termination meeting, and Respondent objected to the question as being outside the scope of direct examination. That objection was sustained. The General Counsel could have called Herrera as a rebuttal witness regarding her recollection, if any, about these two meetings, but again chose not to do so. Under these circumstances, I am unwilling to draw an adverse inference.

later that afternoon. She denied Garcia ever mentioned the Union or a Union meeting; and she denied slamming her hands down or getting upset at Garcia.[39]

Terminations of Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot

Moldenhauer testified that on December 19, 2016, she received an anonymous, typed letter delivered in an interoffice envelope to her office mailbox. Moldenhauer then date stamped and initialed the right corner of the letter. The letter read as follows:

> December 15, 2016
>
> Gardner Management
>
> Dear Sirs:
>
> This is to tell you that there are employees working at Chino who have criminal convictions you do not know about. There are things going on in Chino you may not know about. Like hiring people who have a criminal background and are part of a criminal group.
>
> I hope you can do something about this,
>
> A concerned employee

(R. Exh. 18).

Moldenhauer testified that after receiving the letter she contacted Tom Lanting about it. Lanting told her "to look into it and take care of it." Moldenhauer decided that based on this letter and the October 8 tire theft, she was going to run criminal background checks on all the security guards, tire technicians, yardmen, forklift operators, and lead men who worked at the Chino facility. She testified she picked these classifications because they all moved about the yard and had access to the equipment and the gates on the day of the theft. Respondent contends in its post-hearing brief that this group consisted of 20 employees. (R. Br. 5).

Moldenhauer confirmed that prior to receiving this letter there was no discussion or plan to run these background checks. She testified she conducted the background checks "to determine whether or not they had disclosed criminal backgrounds on their applications and what their criminal backgrounds might be." She discussed her plan with Tom Lanting, and they agreed if any of these employees had falsified their applications, they would be terminated.[40]

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[39] I again credit Moldenhauer over Garcia. The key discrepancy about this second meeting is whether Garcia made any statements about the Union. I do not credit that he did. I found his testimony entirely self-serving, incredulous, and overly dramatic ("bigger that both of us"). Additionally, Garcia testified Moldenhauer had no reaction when he made this claim during the suspension meeting, but she slammed her hands down on the desk and angrily stated she did not appreciate the accusations when he made the same claim during the termination meeting. I find it improbable she would have had such wildly different reactions to the same accusation, just two days apart.

[40] Lanting testified he did not talk with Moldenhauer about what action to take. Lanting repeatedly testified he left these matters for Moldenhauer to handle, and he was not involved. I do not credit his denial. I credit Moldenhauer that she consulted with Lanting about the searches and what to do. Moldenhauer

Moldenhauer performed the background checks herself. She testified she began performing the checks "shortly after" getting the anonymous letter on December 19, but she could not specifically recall when. (Tr. 1481). She also could not recall how long it took her took complete the checks, only that it took her "days" to do. (Tr. 1486). Moldenhauer limited her search to the online criminal court records for Los Angeles, San Bernardino, and Riverside counties, because those counties were where the employees lived, have lived, and/or the company was located. She completed performing the background checks before taking any action against any employee. In the end, the record reflects there were 14 employees who failed to fully disclose their prior criminal convictions on their employment application. Respondent discharged 10 of those 14 employees. The ten consisted of six of the alleged discriminatees (Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot), and Joe Gula, Rene Garcia, Richard Correa, and Alfredo Lopez. (Tr. 1514-15).[41] The ones not discharged were: Leo Velasco, Thomas Morales, Larry Flores, and Daniel Solis. (G.C. Exhs. 15-18).[42]

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was the Director of Human Resources, but when it came to the termination of employees in the course of an organizing campaign, I find she consulted with the President before taking final action.

[41] The only evidence regarding these four individuals is Moldenhauer's testimony that they were also terminated for failing to disclose their criminal convictions on their employment applications, which were discovered when she performed these background checks on the identified group. (Tr. 1514-1516).

[42] Leo Velasco works for Respondent in the mechanic shop as a lead man. He completed two employment applications. The first application he completed was on December 31, 2014, for Classic Sales, Inc. In response to question of whether he had any prior criminal convictions, Velasco checked the "no" box. He also noted on the application that he had been referred by Alex Arzola. He also initialed the acknowledgement statements and signed and dated the application. (G.C. Exh. 18, pgs. 6-11). The second application he completed was on December 2, 2015, for Respondent. In that application, in response to the same question, he checked the "yes" box, but he left blank the lines below asking him to state the nature of the crime(s), when and where convicted, and disposition of the case. He also initialed acknowledgment statements and signed and dated the application. (G.C. Exh.18, pgs. 1-5). Moldenhauer performed a criminal background check on January 4, 2017. (G.C. Exh. 18, pgs. 18-22). The check reflects a violation on September 24, 2014 for "Driv Susp/Revoke CDL DUI/Drugs." It also reflects that he was convicted of this offense, but the document does not readily specify when he was convicted. On his failure to provide specifics regarding his conviction, Moldenhauer testified as follows:

> Q: Okay. And so Gardner decided to assume responsibility for Leo Velasco not completing his application and filling out the nature of the crimes; is that right?
>
> A: We decided to accept the application -- or not to take action because he answered yes, and we assumed responsibility for not requiring him to complete the application with the information.

(Tr. 1709).

Thomas Morales works for Respondent in the mechanic shop as lead man. He completed an employment application for Respondent on December 22, 2015. In response to the same question, he checked the "yes" box, but he too left blank the lines for him to state the nature of the crime(s), when and where convicted, and disposition of the case. He also initialed acknowledgment statements and signed and dated the application. (G.C. Exh. 16, pgs. 7-11). Moldenhauer performed a background check on January 12, 2017, and she learned he had felony convictions. (G.C. Exh. 16, pgs. 12-29). On the issue of his failure to provide the specifics about his conviction, Moldenhauer testified she spoke with Tom Lanting about it, and Lanting decided "[t]hat we would continue to employ Thomas Morales, that he had answered yes, and we accepted the application without requiring the details." (Tr. 1714).

Larry Flores also works for Respondent. He completed two employment applications. The first application he completed was on December 31, 2014, for Classic Sales, Inc. In response to whether he had any prior criminal convictions, Velasco checked the "no" box. He also initialed the acknowledgement statements and signed and dated the application. (G.C. Exh. 15, pgs. 8-12). The second application he completed was on December 2, 2015, for Respondent. In response to the same question, he checked

Michael Talbot

The record reflects Moldenhauer performed her criminal background check on Michael Talbot on January 8, 2017. (Jt. Exh. 3, pg. 33). On January 11, 2017, Moldenhauer called Talbot on the telephone to inform him that he was being discharged for falsifying his employment application. She told him that he was being discharged because he checked the "no" box in response to whether he had any criminal convictions, and a criminal background check showed that he had convictions.[43] Moldenhauer told Talbot to come in the following day to receive his termination paperwork. Talbot responded that he wanted to come in and do it that day. That was the end of their telephone conversation.

Talbot arrived at the Chino facility between 1 and 2 p.m., and he met with Moldenhauer in her office. Moldenhauer provided Talbot with his termination paperwork, which included a copy of his criminal background check. Moldenhauer indicated the background check turned up that Talbot had a felony conviction, which he did not disclose on his application. Talbot then asked whether the company could perform a background check after he had worked there for over a year. Moldenhauer responded they could do a background check whenever they wanted.

Richard Dellorfano

The record reflects Moldenhauer performed her criminal background check on Richard Dellorfano on January 4, 2017. (Jt. Exh. 7, pg. 34). On January 11, 2017, Moldenhauer met with Dellorfano in her office. Anthony Lema was also present. Moldenhauer began by telling Dellorfano that he had not disclosed all of his criminal convictions when he filled out his employment application. Dellorfano responded by asking Moldenhauer if he was being fired. She told him he was. Dellorfano began texting his wife to tell her that he had lost his job, and Moldenhauer asked for him to get off his phone. Dellorfano asked for his checks so he could leave. He was angry and admittedly may have been rude to Moldenhauer.

Moldenhauer provided Dellorfano with the application he had completed and the criminal background report she pulled for him. Dellorfano wrote "Evading 2003, DUI 2015." She pointed out he had not listed all of his convictions. Dellorfano stated he listed some felonies that were

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the "no" box. He also initialed the acknowledgment statements and signed and dated the application. (G.C. Exh.15, pgs. 1-5). Moldenhauer performed a criminal background check on January 4, 2017. (G.C. Exh. 15, pgs. 16-34). The check reflects he was convicted on July 20, 2011 of a misdemeanor Driving Under the Influence (DUI). Moldenhauer offered no explanation about Flores.

Daniel Solis also works for Respondent. On August 16, 2016, he filled out an employment application to work for Respondent as a security guard. In response to the question of whether he had any prior criminal convictions (felonies or serious misdemeanors), Solis checked the "yes" box. As far as the nature of the crime(s), when and where convicted, and disposition of the case, Solis wrote, "2nd Degree Robbery. San Bernardino County 2008. (Will discuss in person)." He also initialed the acknowledgment statements and signed and dated the application. (G.C. Exh. 17, pgs. 2-7). Moldenhauer performed a criminal background check on Solis on January 4, 2017. (G.C. Exh. 17, pgs.10-22). According to the check, there were enhancements to Solis's conviction for gang activity, violent felony, and use of a firearm, which were not listed. (G.C. Exh. 17, pg. 11). Moldenhauer offered no explanation about Solis.

[43] Talbot testified he told Moldenhauer he did not check the "no" box; he left it blank. Moldenhauer denied Talbot said this. I credit Talbot. Talbot was told by Arzola to leave the box blank. I find it more logical and plausible that an employee being terminated for failing to provide information he was told not provide would mention that fact in his defense in the hopes that it would alter the termination decision.

part of his 2003 controlling case, and that they all had been combined into one plea deal that he took. He told her he did not know he had to list all of the charges that were part of the same conviction. Dellorfano also told Moldenhauer that he had informed Alex Arzola when he applied that he could not remember all of his convictions and the dates, and that Arzola told him just to write down what he could remember.[44] After Dellorfano explained this, Moldenhauer told him to come back Friday and talk to somebody and tell them what he had just told her. That was the end of the conversation. Dellorfano then left.

According to Dellorfano, a few minutes after leaving Moldenhauer's office, she called him on the phone and told him again to come back and explain what he had told her to somebody on Friday. Dellorfano responded by telling her it was not really going to make any difference because it felt like they just wanted to get him out of there. Moldenhauer said she did not know anything about that. She told him to come and speak to someone and explain to them on Friday about what he had told her. Dellorfano said that there was really nothing more to speak about, and he hung up the phone. Dellorfano never went back to the facility or spoke to anyone at Respondent about what he had discussed with Moldenhauer during his meeting.[45]

Kurt Leo Rojo

The record does not reflect when Moldenhauer performed her criminal background check on Kurt Leo Rojo. On January 13, 2017, Moldenhauer called Rojo on the telephone call to inform him that he was being terminated for falsifying his employment application by checking the "no" box as to whether he had a criminal conviction (felony or serious misdemeanor). Rojo responded by telling Moldenhauer he had not falsified anything; he had left that section blank. Moldenhauer informed him the "no" box for that question had been checked. Rojo again stated that he never checked the box and instead left it blank. Rojo informed Moldenhauer that he included his convictions on his initial application, and that Alex Arzola told him to redo it. Rojo explained that Arzola had him fill out a completely new application and leave that portion of the application blank. Rojo testified that Moldenhauer responded by telling him to come back in a few months and reapply. That was the end of the conversation.

Moldenhauer testified that Rojo explained to her what Alex Arzola had said to him. Moldenhauer turned to the page of Rojo's application with his initialed acknowledgement statements and asked him if that was his signature at the bottom of the page. He confirmed that it was. She then said that was the application she had on file, and she has to take that as the document in his personnel file—and that was a falsified application. But Moldenhauer testified that after they talked, she decided not to immediately terminate Rojo. She told him she needed some time, and she needed to speak with some other people. She told Rojo she would call him. Moldenhauer testified that within a day or so she called Rojo and told him that the company was going to terminate him. At the end of the call, Moldenhauer told Rojo "why don't you give this a little time and come back and apply in a little while." Rojo asked how long he should wait, and Moldenhauer responded he should come back in three months. (Tr. 1506-07). There is no dispute that Rojo never attempted to reapply following his termination.

[44] Dellorfano listed his 2015 DUI on his application, but he did not mention that conviction also violated his community supervision or parole following his 2003 conviction. (Jt. Exh. 7, pg. 42-59).

[45] Moldenhauer did not testify about a subsequent telephone conversation with Dellorfano, but she did testify that Dellorfano came back to the Chino facility following his termination, and she again invited him to come back to talk about it. According to her, Dellorfano never came back. (Tr. 1498).

Tony Nava

The record reflects that Moldenhauer performed her criminal background check on Tony Nava on January 12, 2017. (Jt. Exh. 9, pg. 78). On January 13, 2017, Moldenhauer called Nava into a meeting in her office. Manager Anthony Lema was present. Moldenhauer informed Nava that he was being terminated for falsifying his employment application by checking the "no" box in response to whether he had ever been convicted of a criminal offense. Moldenhauer informed Nava that she learned of his prior convictions when she performed a criminal background check on him. Nava did not attempt to explain to Moldenhauer why he checked the "no" box at issue.

Gilbert Sanchez

The record reflects that Moldenhauer performed her criminal background check on Gilbert Sanchez on January 12, 2017.[46] (Jt. Exh. 5, pg. 56). On January 13, 2017, Moldenhauer met with Sanchez in her office, along with Manager Al Holguin. Moldenhauer informed Sanchez he was being terminated for lying on his employment application. She informed him that a criminal background check had been performed on him, and it disclosed that he had prior criminal convictions. Sanchez explained to Moldenhauer that Alex Arzola told him not to provide any information about his convictions on his application. Moldenhauer does not recall whether Sanchez told her that he left the questions about his criminal convictions blank, and Sanchez did not testify as to whether he did. According to Moldenhauer, after she talked with Sanchez about his convictions, she suggested that he go look for a job in a smaller operation that may not be so concerned about background and to get experience. She gave him a name of place she knew.

Ray Correa

The record does not reflect when Moldenhauer performed her criminal background check on Ray Correa. On January 13, 2017, Moldenhauer called Correa into a meeting with her and Anthony Lema. She told that Correa he was being discharged for falsifying his employment application, because he checked the "no" box in response to whether he had any criminal conviction, and a criminal background check uncovered that he had a conviction for a serious misdemeanor. Correa testified that he denied lying on his application. He explained to Moldenhauer the conversation he had with Salena Herrera when Herrera told him just to mark "no" in response to the question if he did not have any felonies.[47] According to Correa, Moldenhauer told him that if he could prove that he was not convicted for the serious misdemeanor, that he could possibly get his job back. That was the end of the conversation. They had no further conversation about his prior convictions.

[46] Moldenhauer testified she completed all of the background checks before meeting with employees. However, the evidence establishes she began meeting with employees on January 11, and she continued to perform checks after this date. This factor undermines her credibility regarding these checks overall.

[47] Moldenhauer denied Correa told her Herrera told him to check "no" in response to this question. As previously stated, I find Correa completed his application before speaking with Herrera.

DISCUSSION AND ANALYSIS

A. Implied Threat of Job Loss

The General Counsel contends that David Ceja and Nick Rendon impliedly threatened George Garcia with the loss of employment because of his union support, in violation of Section 8(a)(1) of the Act, when they told him in the dispatchers' office that if he went to the December 31 Union meeting he might not have a job when he gets back. Under Section 8(a)(1) of the Act, an employer may not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. It is well established an employer violates Section 8(a)(1) of the Act when it explicitly or impliedly threatens an employee with job loss for engaging in union or other protected concerted activities. See *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1091-1096 (2004); and *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993). The Board considers whether the statement can reasonably be interpreted by an employee as a threat, regardless of the actual intent of the speaker or the effect on the listener. *Smithers Tire*, 308 NLRB 72 (1992); See also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981). The Board considers the totality of the circumstances in assessing the reasonable tendency of a statement to interfere, restrain, or coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

The first inquiry, of course, is to determine whether the alleged statements were made. In this case, I find they were not. Garcia was the only witness to testify about these alleged threats, stating they occurred while Ceja and Rendon were together in the dispatchers' office, at the start of Garcia's shift, at some point between when the (December 28) Union flyer began circulating and the December 31 Union meeting. As stated, I do not credit Garcia because the three of them could not have been together in the dispatcher's office on the date(s) and at the time(s) Garcia claims. Ceja was on a family vacation in Texas from December 25, 2016 through January 3, 2017, and Rendon typically arrived for work two or three hours after Garcia's usual start time. I, therefore, recommend dismissing the allegation.

B. Interrogations

The General Counsel alleges Respondent unlawfully interrogated employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act. Specifically, the General Counsel contends that: (1) on around December 28, 2016, Jordan Lanting unlawfully interrogated employees when he found a copy of the Union flyer in the locker/cabinet in the tire shop break room and asked the employees what the flyer was about; and (2) on around December 30, 2016, Tom Lanting unlawfully interrogated Tony Nava when he asked Nava whether he had Nava's loyalty. Interrogating an employee about their union support, sympathies, or activities violates Section 8(a)(1) of the Act if, under the totality of the circumstances, the questions would have a reasonable tendency to restrain, coerce or interfere with Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985) (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). In evaluating the questioning, the Board considers factors, such as: (1) the background or context in which the questioning occurs; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. See *McClain & Co*., 358 NLRB 1070 (2012), see also *Camarco Loan Mfg. Plant*, 356 NLRB 1182 (2011). *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004). These factors are not to be "mechanically applied" and it is not essential that every element be met. Reasonable tendency is an objective standard and, therefore, does not turn on

whether there was actual intimidation. *Multi-Aid Service*, 331 NLRB 1126 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

In evaluating the totality of the circumstances, the Board considers not only prior and contemporaneous statements or events, but also those that occur after the fact. See *Westwood Health Care Center*, 330 NLRB 935, 940 (2000). In *Westwood Health Care Center*, the Board held that "[s]uggestions conveyed in one conversation may contribute to the impact of the next. By the same token, a question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone." Id.

I conclude that Jordan Lanting engaged in unlawful interrogation on December 28 when he went into the break room and began questioning the tire shop employees about the Union flyers. Lanting is the president's son. His job is to recruit and hire drivers; he has no role or responsibility over the non-driver employees in the tire shop. His office is in the administrative building, and, prior to the circulation of the Union flyers, he was seldom, if ever, seen inside the tire shop. After the flyers began circulating, Lanting was seen in the tire shop, and other parts of the facility, several times a day. His visit to the tire shop on December 30 was neither random nor casual. He entered the break room and immediately began searching around until he came across what he was looking for--the Union flyers--inside an open employee locker/cabinet. He pulled out a flyer and began reading it. And despite the flyer being clear on its face, Lanting asked what the flyer was all about. Lanting's question was intended to determine who was involved in promoting the Union by circulating the flyers. See *United Services Automobile Assn*., 340 NLRB 784, 785-86 (2003), enfd. 387 F.3d 908 (D.C. Cir. 2004) (Board finds that employer violates Section 8(a)(1) by interrogating employees about the distribution of flyers).[48] The only person to respond was Michael Talbot, and he told Lanting it was against the law for him to ask about the flyers. Later that same morning, Moldenhauer came into the tire shop break room with Jordan Lanting and asked Talbot who used the lockers where the flyers were found. Later that afternoon, Respondent suspended Talbot and four other employees who were in the break room at the time of Lanting's visit for distributing the Union flyers. Under the totality of these circumstances, I conclude that Lanting's questioning had a reasonable tendency to interfere, restrain, or coerce employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.[49]

I also conclude that Tom Lanting engaged in unlawful interrogation on around December 30 when he questioned Nava about his loyalty. The identity of the questioner and context of the conversation is critical. Two days earlier, when the flyers first started circulating around the Chino facility, Tom Lanting's son, Jordan Lanting, stood in Nava's office doorway with a copy of the Union flyer in his hand, saying to someone down the hall about the flyer, "It wasn't Tony because Tony is a good guy." He was referring to the Union flyer and the implication is that "good guys" don't circulate union flyers. Then, on December 30, Nava attended the mandatory meeting for the non-drivers in which Tom Lanting spoke about the company and how it treated

[48] Respondent has a no-solicitation policy that, if non-discriminatorily enforced, would prohibit the distribution of these and other flyers during work time and in work areas. Respondent initially relied upon this policy to suspend five employees for distributing the Union flyers, but then inexplicably rescinded that discipline the following morning. It is unclear why the discipline was rescinded. Under these circumstances, I need not consider whether the no-solicitation policy and the purported investigation as to whether that policy was violated serves as a legitimate reason for the interrogation at issue.

[49] There is no allegation that Moldenhauer unlawfully interrogated employees when she went into the tire shop break room and questioned employees about who used the locker(s) where the flyers were found.

its employees, and that he did not believe the employees needed a union or a third-party between them. When asked about Saturday overtime for the non-drivers, Lanting said there was plenty of work and overtime was available if people wanted, but it was not required. He stated if employees had to go to the Union meeting, or if they had somewhere else to go, they could. It was in this context that Nava later that day had his meeting with Tom Lanting and Nava's supervisor, Walter Ramirez. No one else was around. Lanting brought up Nava's interest in climbing the company ladder and in taking on additional duties and responsibilities, including overseeing some of the non-drivers. Nava indicated he was interested. The three discussed and agreed to the changes and responsibilities Nava would have as a lead man moving forward.[50] Lanting then asked Nava if he had Nava's loyalty, and Nava responded he had no plans on leaving the company. They shook hands, and that ended the meeting.

Under these circumstances, I conclude the president of the company questioning Nava about his loyalty during a conversation discussing a promotion in which Nava was going have some responsibility over other non-drivers, including the tire technicians, who were attempting to organize a union has a reasonable tendency to interfere with, restrain, or coerce employees in exercise of their Section 7 rights.

Even if Lanting's question could be considered innocuous at the time, it acquired a more ominous tone on December 31, when Lanting came to the Chino facility. Nava informed him about how few of the tire technicians showed up to work Saturday overtime and, presumably, went to the Union meeting. Lanting told Nava, "The tire shop makes you look bad. If the new owners were to come in here today, they'd fire you." He added "If you don't like these tire shop guys, just go to HR, lie to them, tell them they threatened you." In this context, it is reasonable to conclude that Lanting's questioning Nava about his loyalty was really asking whether Nava was going to do what Lanting asked, which, in this instance, was to help get rid of the tire technicians for attending the union meeting. Under all of these circumstances, I find Lanting's loyalty question has a reasonably tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

C. Discharges of Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot

The General Counsel alleges Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot, because of employees' union activities and to discourage others from engaging in those union activities. Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In cases alleging violations of Section 8(a)(3) and (1) where the employer's motive is at issue, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish a violation under *Wright Line*, the General Counsel must prove, by a preponderance of the evidence, that the employee's protected activity was a substantial and motivating factor in the employer's decision

[50] In its post-hearing brief, Respondent asserts the exchange between Lanting and Nava was "a short, casual conversation that related solely to Nava, already an administrative employee, moving up further into management of the company and did not relate to the Union whatsoever." (R. Br. 56). There is no contention Nava was a statutory supervisor; and the evidence to prove that is lacking.

to take the adverse action(s). *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996).[51] The General Counsel satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. Proof of employer knowledge and animus can be established through direct evidence or inferred from circumstantial evidence. See *Kajima Engineering & Construction*, 331 NLRB 1604, 1604 (2000); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996). The Board may infer knowledge based on the timing of the alleged discriminatory actions; the employer's general knowledge of its employees' union activities; and the pretextual reasons given for the adverse personnel actions. See *Lucky Cab Co*., 360 NLRB 271, 275 (2014); *North Atlantic Medical Services*, 329 NLRB 85, 85-86 (1999), enfd. 237 F.3d 62 (1st Cir. 2001); *Montgomery Ward*, supra; *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988). The Board may infer animus from, inter alia, suspicious timing, false reasons given in defense of the contested action, inadequate investigation, departures from past practices, past tolerance of the behavior at issue, disparate treatment, and/or shifting defenses. *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

If the General Counsel is successful, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. See also *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing it had a legitimate reason for its action; rather, it must show it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails to show that it would have taken the same action regardless of the protected conduct. *Austal USA, LLC*, 356 NLRB 363, 364 (2010).

In applying this framework, I conclude the General Counsel has proven, by a preponderance of the evidence, that the employees' union activity was motivating factor in Respondent's decision to discharge Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot, who all either participated in conversations about contacting the Union about organizing, attended a Union meeting, circulated Union flyers, and/or were present during conversations about the flyers. Respondent had general knowledge of the organizing effort as of December 28, when it discovered the Union flyers throughout the Chino facility, and it terminated all six of these individuals within two and a half weeks of acquiring this knowledge. However, there is more than general knowledge and timing in this case. On December 28, Jordan Lanting learned from Gary Villalobos that the flyers were coming from the tire shop. Lanting went into the tire shop break room and found Correa, Rojo, Sanchez, Talbot, and others, along with a stack of Union flyers in an open employee locker/cabinet. Lanting interrogated the employees about the flyers, and then left to notify Moldenhauer. Moldenhauer and Lanting went back to the tire shop, and Moldenhauer asked Michael Talbot which employees used the two lockers/cabinets. Talbot told her that he, Matthew Talbot, and Kurt Leo Rojo shared one, and the night-shift tire technicians (Correa and Sanchez) used the other. Later that day, Respondent suspended Talbot, Rojo, and

[51] Respondent asserts in its post-hearing brief that the General Counsel also is required to show a nexus or causal connection between the protected activity and the adverse action. (R. Br. 38). The General Counsel, however, is not required to "demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298, 1301, fn. 10 (2014), enfd. sub nom. *AutoNation v. NLRB*, 801 F.3d 767 (7th Cir. 2015). However, if there were a casual nexus requirement, I find, as discussed below, it existed because Respondent decided to perform the background checks which lead to the discharges because the employees sought to organize a Union.

others for circulating the Union flyers. Moldenhauer made sure that Tom Lanting was aware of all of this. Moldenhauer then contacted legal counsel, who provided Moldenhauer with guidance on the do's and don'ts in responding to an organizing effort. On around December 30, Respondent's managers met to discuss this guidance and then held a mandatory meeting for its non-drivers where Tom Lanting talked about the company, the Union, and the upcoming Union meeting. When asked about Saturday overtime for the non-drivers, Lanting said overtime was available if people wanted to work, but it was not required. He stated if employees had to go to the Union meeting, or if they had somewhere else to go, they could. On Saturday, December 31, Tom Lanting went to the Chino facility and asked Nava about how many tire technicians showed up for work, and Nava told him only a few. From that Lanting was better able to determine which employees may have attended the Union meeting. On that same date, Dellorfano spoke with Tom and Jordan Lanting about the Union, and that he had wanted to go to the Union meeting but was not able to leave in time to make it there. Luis Barragan testified that the following week, when employees returned to work, everybody was saying the whole tire shop and a few drivers were at the Union meeting. Based on the foregoing, I find the General Counsel has established protected activity and employer knowledge.

Respondent argues the General Counsel failed to prove Respondent had knowledge of each individual's protected activity. However, the General Counsel need not establish employer knowledge of each discriminatee's particular union activity when, as here, an employer takes adverse action against a group of employees, regardless of their individual sentiments toward union representation, in order to punish the employees as a group "to discourage union activity or in retaliation for the protected activity of some." *Electro-Voice, Inc.*, 320 NLRB 1094 fn. 4 (1996) (quoting *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985) and citing additional cases therein); *Birch Run Welding*, 269 NLRB 756, 764-765 (1984) (endorsing theory "that Respondent engaged in a general retaliation against its employees because of the union activities of some of its employees in order to frustrate all union activities, even though some of those employees caught in the retaliatory net were not involved in union activities"), enfd. 761 F.2d 1175, 1180 (6th Cir. 1985) ("the General Counsel may also prevail by showing that the employer ordered general lay-offs for the purpose of discouraging union activity or in retaliation against its employees because of the union activities of some. . . . [T]he theory can be valid even though not all union adherents were laid-off. . . The focus of the theory is upon the employer's motive in ordering extensive lay-offs rather than upon the anti-union or pro-union status of particular employees. The rationale underlying this theory is that general retaliation by an employer against the work force can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters"). In this case, Respondent discharged a total of 10 employees for allegedly falsifying their employment applications by failing to disclose their criminal convictions. The group included those not engaged in protected activity, and it did not include others who were.[52] As discussed below, I

[52] Respondent argues the decision to discharge was not motivated by union activity because it did not discharge all known or suspected union supporters (e.g., Matthew Talbot, Mike Garcia, Mark Garcia, etc.). I reject this argument, noting the Board has acknowledged that an employer's failure to discriminate against all union supporters does not establish that its actions toward the few were lawfully motivated. See e.g. *The George A. Tomasso Construction Corp.*, 316 NLRB 738, 742 (1995); *Master Security Services*, 270 NLRB 543, 582 (1984); *Hale and Sons Construction*, 219 NLRB 1073 fn. 8 (1975) ("An employer's failure to discharge all the union adherents does not necessarily indicate an absence of discriminatory intent as to those he did discharge. It is not necessary, nor is it ordinarily feasible, to discharge or fail to recall every union member or adherent in order to discourage union activities. This may be accomplished by making 'an example' of some of the union adherents.")(internal quotations and citations omitted). Similarly, the Board has held that in the context of an organizing drive, it is a violation

conclude that Respondent discharged these six non-drivers as part of an attempt to punish the employees as a group, to discourage union activity, and to retaliate for the protected activity of some. Therefore, under Board law, the General Counsel is not obligated to establish a correlation between each employee's protected activity and his discharge.

As for animus, there is both direct and circumstantial evidence. Tom Lanting's comments to Tony Nava on December 31 are direct evidence of animus. After Lanting learned how few of the tire technicians showed up to work, and may have gone to the Union meeting, Lanting told Nava, "The tire shop makes you look bad. If the new owners were to come in here today, they'd fire you." Lanting said, "If you don't like these tire shop guys, just go to HR, lie to them, tell them they threatened you." Lanting then said, "I have lunch with judges, police officers, district attorneys. Who do you think they're going to believe, me or these tire shop guys? I'm the meanest person, Tony, you ever want to meet. I love animals more than people." I find these statements are a reflection of Lanting's anger and hostility toward those who he believed went to the Union meeting, as well as an indication of his desire to take action (or have his subordinates) punish and retaliate against them.

There also is circumstantial evidence from which to infer animus. As stated, all six of the alleged non-driver discriminatees were discharged within two and a half weeks of Respondent learning of the Union organizing effort. Although each case is fact specific, this short of a period is more than sufficient to warrant an inference of unlawful motivation. See, e.g., *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (2012), enfd. 734 F.3d 764 (8th Cir. 2013) (timing of employee discipline, less than 2 months after employer learned of protected activities and 2 weeks following union election, evinces unlawful motivation); *Corn Brothers, Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); and *Country Epicure, Inc.*, 279 NLRB 807,808 (1986)(unlawful motivation inferred from adverse actions within 3 weeks of protected activity).

Respondent asserts it discharged Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot, as well as four others (Joe Gula, Rene Garcia, Richard Correa, and Alfredo Lopez), as soon as it performed the background checks and learned they had failed to disclose their criminal convictions on their employment applications.[53] This, of course, raises the core question: when and why did Respondent make the decision to perform the criminal background checks? Respondent contends it made the decision after Moldenhauer received the December 15 anonymous letter stating there were employees at the Chino facility who have criminal convictions and are part of a criminal group. Moldenhauer testified she received the letter on December 19. She then spoke with Lanting, and he told her "to look into it and take care of it." Moldenhauer testified she decided based on this letter and the October 8 tire theft that she

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of Section 8(a)(3) of the Act to discharge a neutral employee in order to facilitate or cover-up discriminatory conduct against known or suspected union supporters. See *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), enfd. 12 F. 3d 213 (6th Cir. 1993); *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986). Therefore, even if not all of the alleged discriminatees engaged in protected activity, they would be neutrals and their discharges still would be unlawful because they were to facilitate or cover-up discriminatory conduct against the known or suspected supporters.

[53] As stated above, it is a violation of Section 8(a)(3) of the Act to discharge a neutral employee in order to facilitate or cover-up discriminatory conduct against union supporters. However, in this case, there is no allegation or argument that the discharges of these four neutral individuals violated the Act.

would run criminal background checks on all the positions that moved about the yard and had access to the equipment and the gates on the day of the theft. Moldenhauer confirmed that prior to receiving this letter there was no discussion or plan to run these background checks.[54]

I agree with the General Counsel and the Union that Respondent's stated reasons for the background checks---the receipt of the December 15 letter and the October 8 tire theft—are pretextual. First, I am dubious about the existence and timing of the December 15 letter. It is a typed letter allegedly placed into an interoffice envelope and left in Moldenhauer's office mailbox. There is no way to trace who wrote it or why. It could have been created by a well-meaning employee attempting to alert management about a concern or manufactured by a member of management after the fact to justify the timing of the background checks. Moldenhauer was the only witness to testify when the letter was received. She testified she received and date-stamped the letter on December 19. Tom Lanting testified Moldenhauer told him she had received an anonymous letter, but he did not testify as to when she received it or when she told him about it. He also confirmed that he saw the letter, but he could not confirm when. He testified, "I didn't see it the day she told me. But I think I'd seen it afterwards." (Tr.1015). He never defined what "afterwards" meant. Additionally, there is no other contemporaneous evidence (e.g., emails, correspondence, memo, etc.) reflecting when the letter was received or otherwise seen. Without more, I find Moldenhauer's uncorroborated testimony to be too suspect to be credited, particularly in light of the other evidence discussed below regarding these background checks.

Similarly, I am dubious about Respondent's alleged reaction to the contents of the anonymous letter. Moldenhauer testified that after she received the letter, she alerted Tom Lanting, and the two decided to launch an investigation in light of the October 8 theft. Again, the letter advised there were employees at the Chino facility who had criminal backgrounds and/or were part of a criminal group. However, Moldenhauer and Lanting both already knew or had reason to suspect this. Tom Lanting knew for several years that Alex Arzola was a member of the Mongols Motorcycle Club (which Lanting referred to as a "motorcycle gang"), and that Arzola informed him there were other members of the Mongols working at the Chino yard. (Tr. 1028; 1041).[55] When Arzola told him this, Lanting did not ask any follow-up questions. Lanting

[54] Moldenhauer testified she made the decision to conduct the background checks after receiving the anonymous letter and talking with Tom Lanting. But she never testified as to specifically when the decision to perform these checks was made, or when the checks began. She also testified that it took her "days" to perform the background checks. Ten of the 20 criminal background checks Moldenhauer performed are in the record. The checks on Richard Dellorfano, Larry Flores, Daniel Solis, and Leo Velasco are dated January 4, 2017. (Jt. Exh. 7, pg. 34)(G.C. Exh. 15, pg. 16)(G.C. Exh. 17, pg. 10)(G.C. Exh. 18, pg. 19). The check on Michael Talbot is dated January 8, 2017. (Jt. Exh. 3, pg. 33). The checks on Gilbert Sanchez, Tony Nava, and Thomas Morales are dated January 12, 2017. (Jt. Exh. 5, pg. 56)(Jt. Exh. 9, pg. 78)(G.C. Exh. 16, pg. 12). The background checks for Ray Correa and Kurt Leo Rojo are not dated. Although the record does not contain all of the background checks Moldenhauer performed as part of this search, none of the checks in the record were conducted prior to December 31; therefore, Moldenhauer was aware of the Union organizing effort at least as of the time she conducted these specific checks. And, under the overall circumstances, particularly the lack of evidence of any searches prior to December 31, I do not credit that any of the searches were done prior to that date.

[55] Although several of Respondent's witnesses alluded to the Mongols being a criminal group, none so specifically stated. My impression from watching and listening to these witnesses (Tom Lanting, Kathleen Moldenhauer, and Christi Triay) is that they knew or suspected that the Mongols were a criminal group before Respondent received this anonymous letter. Moldenhauer was aware there was a gang injunction involving the Mongols because she lived in the area where the injunction was issued. (Tr. 1768-1769).

explained that: "As long as the employee does his job, then his personal business is his personal business. If he passes everything with HR, you know, all the guidelines what we want, that's his personal life." (Tr. 1044-1045). Moldenhauer also knew Arzola was member of the Mongols, and that he had hired other members of the Mongols to work at the facility. (Tr. 1767-1768). It, therefore, was hardly a surprise for them to learn or at least suspect there were people affiliated with a criminal group working at the Chino facility.

I also do not credit the October 8 tire theft was an impetus for Respondent to conduct the criminal background checks. The tire theft occurred more than two months prior to the receipt of this letter. The letter did not provide Moldenhauer or Lanting with any information they did not already know or suspect at the time of the tire theft. Furthermore, at the time of the tire theft, Respondent had evidence, based on the movement of the truck around and out of the rear exit to the yard, as well as the discarded GPS device that was hidden on the trailer, that the theft was likely committed by or with the assistance of someone working at the Chino facility. Respondent's Safety Director Anthony Lema reported to the investigator that "it was logical to conclude that there was internal involvement." The third-party investigator also concluded the theft was likely an inside job. Moreover, at the time, there were rumors circulating that Alex Arzola and another employee may have been involved. Tom Lanting, himself, believed Arzola had "orchestrated the whole theft." Yet, despite all of this, Respondent never conducted an investigation to determine which, if any, of its employees may have been involved in the theft. Respondent now contends that it was after receiving this anonymous letter--which offered little (if any) more than what Respondent already knew or suspected after the theft occurred—that it suddenly decided to examine the criminal backgrounds of a certain segment of its workforce and discharge some of those who failed to fully disclose their criminal convictions. Finally, although Moldenhauer testified the October 8 tire theft was one of the reasons she conducted these background checks, she confirmed that after she performed the criminal background checks, she *never checked to see whether any of those individuals were working that Saturday*. (Tr. 1779). All these factors lead me to conclude Respondent's proffered reasons are pretextual.

I further infer animus based on the (in)adequacy of the investigation, the departure from past practices, and disparate treatment. As previously stated, Respondent performs criminal background checks on its drivers, but not on its non-drivers. There is no evidence Respondent ever before performed a background check on a non-driver. Additionally, Respondent typically utilized a third-party administrator (e.g., Gamino & Associates) to conduct the checks and report back any issues. However, in this case, Moldenhauer performed the checks herself, during her evenings. And rather than searching nationwide or statewide, Moldenhauer limited her search to the online court records for the three counties where the employees lived, have lived, and the Chino facility was located. If an employer was attempting to fairly and objectively determine whether employees had falsified their employment applications by not fully disclosing their criminal conviction(s), it is quizzical why it would deviate from its practice of hiring a third-party professional to perform the searches or to limit the searches to online data for only three counties. Both suggest Respondent was more interested in completing the searches quickly than doing them thoroughly.[56]

[56] This conclusion is further supported by Moldenhauer's testimony about why she did not check the criminal backgrounds of the mechanics working at the Chino facility. She testified that "I limited it to the people that were moving around in the yard. And the mechanics are in the shop and typically stay in the shop. *And resources. I was doing this by myself at night*." (Tr. 1793-1794)(emphasis added).

The thoroughness and objectivity of Moldenhauer's investigation is further called into doubt by her response to learning that several of the discriminatees had been told by Alex or Danny Arzola to leave the application question about their criminal convictions blank. Michael Talbot, Gilbert Sanchez, and Kurt Leo Rojo each told Moldenhauer this is why they left the question blank, and they were not the ones who checked the "no" box on their applications. Even though three separate employees told her this, she did not investigate whether this was true. As previously stated, the markings in the "no" box for Talbot and Sanchez are sufficiently different from the rest of the markings on their applications to at least warrant investigation. Moldenhauer did not; she simply moved forward with the discharges. Correa also told Moldenhauer that Selena Herrera told him to check "no" if he did not have any felonies. And while I do not credit Herrera said this to Correa, Moldenhauer did nothing to verify whether this may have been true; she again simply moved forward with termination. With Rojo, Moldenhauer testified she delayed her decision to talk with people about what Rojo stated to her about Alex Arzola telling him to leave the question blank, but there is no evidence she actually spoke with anyone before moving forward with Rojo's termination.

Finally, with regards to Dellorfano, there is evidence of disparate treatment based on how Respondent reacted to him versus others who also failed to fully disclose their prior criminal convictions. Thomas Morales and Leo Velasco both checked the "yes" box as to whether they had any criminal convictions, but they failed to fill in the blanks explaining the nature of the crime(s), when and where they were convicted, and the disposition(s) of the case(s). (GC Ex. 16, pg. 8, 13–17) (GC Ex. 18, pg. 2,18-19). Moldenhauer saw these omissions when she performed the background checks, spoke with Tom Lanting about it, and Lanting decided not to terminate either because he considered it an oversight on Respondent's part not to catch that the information had not been provided. Moldenhauer did not have a similar conversation with Lanting regarding Dellorfano, and Dellorfano was not given a similar reprieve.[57] Like Dellorfano, Solis checked "yes" for the criminal background question and indicated second degree robbery in the explanation portion, but he failed to mention the enhancements to that crime for felony conviction for gang activity, violent felony, and use of a firearm. (G.C. Exh. 17, pg. 11). Despite omitting this information, Solis was not terminated. Respondent provided no explanation regarding why Solis was not discharged. Respondent points out that Moldenhauer told Dellorfano multiple times to come back and explain his situation, but he chose not to do so. I do not find these offers absolve Respondent of liability because they did not impose the same obligations on these other three; it simply decided to retain them without then taking any additional action.

There also is evidence of disparate treatment regarding Correa. He was discharged because he checked the "no" box regarding his prior criminal convictions, even though he had misdemeanor convictions. Larry Flores also checked "no" box under the same or similar conditions. (GC Ex. 15, pg. 9, 16–17). Flores, however, was not discharged, and Respondent provided no explanation for why not.

[57] Counsel for the General Counsel and the Union cite to Jordan Lanting as another comparable that was disparately treated. Jordan Lanting filled out an employment application (although not in the record), and he checked the "yes" box as to whether he had any prior criminal convictions, but he did not provide the necessary details or explanation. Like Morales and Velasco, he left those lines blank, and he was hired and not later discharged. I do not consider Lanting to be a comparable. He is Tom Lanting's son, and Tom Lanting testified he knew all about his son's criminal convictions prior to hiring him. Moreover, Jordan Lanting interviewed with Kathleen Moldenhauer, and they discussed his criminal convictions. As a result, unlike Morales and Velasco, I find Respondent had knowledge about Lanting's convictions.

In light of the foregoing, I conclude the General Counsel has proven, by a preponderance of the evidence, that the employees' protected activity was a motivating factor in Respondent's decision to discharge Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot, and that Respondent's proffered defenses for discharging them are pretextual. Because its proffered defenses have been proven to be pretextual, Respondent fails by definition to show that it would have taken the same action but for the protected activity, and there is no need to perform the second part of the *Wright Line* analysis. See *Austal USA, LLC*, 356 NLRB at 364.

If the second part of the *Wright Line* test did apply, I would conclude that Respondent has not established it would have taken the same action in the absence of protected activity because it does not consistently terminate individuals who fail to fully disclose their prior criminal convictions for felonies and serious misdemeanors. Respondent discharged the six discriminatees and four other employees (Joe Gula, Rene Garcia, Richard Correa, and Alfredo Lopez) for this, but it did not discharge Velasco, Morales, Flores, or Solis for essentially the same offense. In light of this disparate treatment, which arose out of the same batch of criminal background checks, I conclude Respondent has failed to meet its burden.

As a result, I conclude that Respondent discharged employees Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot, because of the employees' union activities and/or to discourage others from engaging in those activities, in violation of Section 8(a)(3) and (1) of the Act.

D. *Suspension of George Garcia*

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by suspending George Garcia on January 3, 2017, because he assisted the Union and to discourage employees from engaging in these activities. Respondent denies the allegations, contending that it suspended Garcia because he failed to turn in his driver logs for over a week.

As previously stated, under *Wright Line*, the General Counsel must first establish, by a preponderance of the evidence, that the employee's protected activity was a substantial or motivating factor for the adverse action(s) by proving the existence of protected activity, the employer's knowledge of the activity, and animus. If the General Counsel meets his burden, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. If the employer's proffered reasons for its action(s) are pretextual, it fails to meet its burden because a finding of pretext defeats any attempt by the employer to show that it would have taken the adverse actions regardless of the protected activity. *Rood Trucking Co.*, 342 NLRB 895 (2004); *Austal USA, LLC*, 356 NLRB 363 (2010).

I find the General Counsel has met his initial burden of establishing that Garcia's protected activity was a substantial or motivating factor for Respondent's decision to suspend him.[58] I conclude that Garcia attended the December 31 Union meeting, and Respondent's Operations Manager Luis Barragan had knowledge that Garcia attended the meeting. Under the circumstances, I impute his knowledge to Respondent. See *The Parksite Group*, 354 NLRB

[58] The General Counsel contends Respondent knew Garcia intended to attend, and later attended, the Union meeting based on his conversation with Ceja and Rendon in the dispatcher's office, and his meeting with Moldenhauer in which he accused her of suspending him because he went to the meeting. As stated, I do not credit Garcia's testimony regarding either of these conversations, and, therefore, conclude they could not serve to put Respondent on notice about Garcia's Union activity.

801, 804 fn. 18 (2009); *State Plaza Hotel*, 347 NLRB 755, 756 (2006); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 fn. 36 (2005) (knowledge of supervisor or agent imputed unless it is affirmatively established individual with knowledge did not pass information on to others).[59] Additionally, I infer animus based on the timing of suspension a few days after Garcia attended the Union meeting, as well as the general animus Respondent exhibited toward the non-drivers (discussed previously).

As a result, the burden shifts to Respondent to establish it would have taken the same actions in the absence of Garcia's protected activity. The General Counsel and the Union contend that Respondent cannot meet its burden because its proffered reasons for suspending Garcia are pretextual. I reject this contention.

Respondent suspended Garcia on January 3 because he failed to timely submit his logs from December 20 through December 30, 2016. The General Counsel and Union do not contest that he failed to submit logs for these days, or that he failed to timely submit his logs in the past. Rather, they argue pretext based on disparate treatment, shifting defenses, and delayed action. First, they argue Garcia had a history of failing to timely submit his timesheet logs, but he was not disciplined for it until after he went to the Union meeting. This contention is belied by the documentary evidence. Respondent issued Garcia verbal and written warnings in 2011 and 2012 for failing to timely submit his logs. In 2013, when Garcia again failed to timely submit his logs, he was not formally disciplined, but he was instructed to submit his delinquent logs. Garcia claims he continued to have issues timely submitting his logs from 2013 through the end of his employment, and he was never disciplined for it. Barragan, however, testified he did not have issues with Garcia failing to timely complete his logs until 2016. (Tr. 1178-1179). As previously stated, I do not credit Garcia. And, without corroborating evidence, I do not rely on his testimony to establish that he continually failed to timely submit his timesheet logs, or that he did so without any repercussions.

The General Counsel and the Union also argue Respondent has offered shifting reasons for suspending Garcia on January 3. They contend that Moldenhauer initially told Garcia he was being suspended for not wearing proper safety equipment and for not recording his time correctly. And when Garcia argued the discipline was old, and that a suspension was not consistent with the progressive disciplinary process, Moldenhauer shifted/changed the reason for the suspension to his failure to timely submit his logs. The General Counsel and the Union rely upon Garcia's testimony to support this argument. However, as previously stated, I credited Moldenhauer over Garcia that she first gave Garcia the warning/suspension from compliance/safety for failing to submit his logs, and then showed him his earlier discipline only after he claimed Respondent could suspend him because it had failed to previously issue him verbal and written warnings. I conclude Respondent did not offer shifting reasons for its decision to suspend Garcia on January 3.

The General Counsel and the Union further argue Respondent's delayed action in disciplining Garcia supports a finding of pretext. They argue Dispatcher Rendon's November 4, 2016 email in which he complained to upper management about Garcia's performance and recommended "immediate action" put Respondent on notice about Garcia's issues, but

[59] Barragan testified he never told Kathleen Moldenhauer or anyone that "Garcia supported the Union." (Tr. 1159). While this may be true, it is not same as testifying he never told anyone that Garcia attended the Union meeting. As such, I find Respondent has failed to affirmatively establish that Barragan did not pass on his knowledge of Garcia's protected activity (attending the meeting) to higher management.

Respondent did not take action until January 2017, after it learned of Garcia's Union activity. The General Counsel cites to *Waterbury Hotel Management LLC*, 333 NLRB 482, 483, 547 (2001), affd *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645 (D.C. Cir. 2003), and *NLRB v. Colonial Press, Inc.*, 509 F.2d 850, 854 (8th Cir. 1975), which the General Counsel contends hold that where an employee commits an act of asserted misconduct that would justify her discharge, and the employer is fully cognizant of the act and does not discipline the employee, the employer may not thereafter rely on that misconduct as a basis for discharging the employee. Respondent counters that in *NLRB v. Colonial Press, Inc*., the Court of Appeals held that the doctrine of condonation is appropriate only when there is clear evidence that the company has forgiven the employee for the misconduct and agreed to resume the employer-employee relationship. The Court of Appeals held "[t]he principle of waiver by condonation used in the context of labor relations is that, if after an employee commits acts of misconduct lawfully justifying his discharge, and thereafter the employer, fully cognizant of the acts, agrees not to discipline him, the employer may not thereafter rely on the same misconduct as the basis for discharging or refusing to reinstate the employee. Thus, the doctrine is properly invoked 'only where there is clear and convincing evidence that the employer has completely forgiven the guilty employee for his misconduct and agrees to a resumption of (the) company-employee relationship as though no misconduct had occurred.'" *NLRB Colonial Press, Inc. v. NLRB*, 314 F.3d at 854 (quoting *Packers Hide Association v. NLRB*, 360 F.2d 59, 62 (8th Cir. 1966)).

I find that Respondent's failure to take immediate action in response to Rendon's November 4 email does not constitute condonation of Garcia's misconduct such that Respondent would be barred from later disciplining/suspending him for failing to timely submit his logs. First, there is no evidence Respondent forgave Garcia for the misconduct alleged in the email or that it agreed to continue the employment relationship as if none of it had occurred. On the contrary, Moldenhauer instructed Barragan and Rendon to monitor Garcia and to hold him accountable if he fails to perform his job as expected. Second, Rendon's email raises several concerns about Garcia, but nothing about him failing to timely submit his logs. That is a matter left for Respondent's compliance/safety department, and the first notice Moldenhauer had from compliance/safety that Garcia was not timely submitting his logs was during the weekly safety meeting on January 3. Compliance/safety informed her that Garcia was going to be suspended, and she handed Garcia that warning/suspension that same day. I, therefore, reject the General Counsel's and Union's arguments about delayed action or condonation.

Overall, I find Respondent's stated reason for suspending Garcia (failure to submit timely logs) is not pretextual.

I also find Respondent has established it would have suspended Garcia in the absence of his protected activity. Respondent's prior discipline of Garcia in 2011 and 2012 for failing to turn in his logs occurred prior to him engaging in any protected activity. And unlike in 2013 when he was not disciplined, Garcia's admitted failure to timely submit his logs in December 2016 was his fourth offense in 9 months. The three other offenses are: the April 14 written warning for leaving the scene of an accident in which he damaged a vehicle; his September 15 verbal warning/counseling for failing to wear personal protective equipment; and his November 1 written warning for failing to use the time clock and record his time correctly. Under Respondent's progressive disciplinary policy, a one-day suspension is entirely appropriate for an employee who has a fourth offense within a year, particularly when they appear to include the more serious Level 1 Corrections (e.g., failure to use personal protective equipment, acts of indifference, carelessness, or dishonesty, etc.). Moldenhauer certainly could have moved forward with the original three-day suspension, but instead she reduced it to a one-day suspension in an effort to get Garcia to start timely submitting his driver logs.

Based on the foregoing, and despite the timing, I conclude the General Counsel has not established that Respondent suspended Garcia, in violation of Section 8(a)(3) and (1) of the Act. I, therefore, recommend the allegation be dismissed.

E. *Discharge of George Garcia*

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging George Garcia on January 5, 2017. Respondent denies the allegations and asserts that it discharged Garcia because he had falsified his timesheets to record times he had not worked. Similar to the suspension, I find the General Counsel has met his initial burden under *Wright Line* of establishing that Garcia's protected activity was a substantial or motivating factor in Respondent's decision to discharge him. The burden then shifts to Respondent to establish it would have taken the same actions in the absence of Garcia's protected activity. The General Counsel and the Union contend that Respondent cannot meet its burden because its proffered reasons for discharging Garcia are pretextual based on Respondent's allegedly hasty and flawed investigation and its departure from past practice. I reject this contention.

The General Counsel and Union argue that Moldenhauer's audit was hastily completed and based on an inaccurate or incomplete investigation. Her investigation consisted of comparing Garcia's handwritten timesheets and his electronic logs. In her audit, Moldenhauer compared the information for the days Garcia worked between November 27 and December 24, 2016, and she completed a chart. As stated, Garcia worked 19 days during this period. Moldenhauer found one day when there was no discrepancy (December 12), and one day where the discrepancy was less than one hour (December 6). There are 5 days where there is timesheet or an electronic log, but not both. For the remaining 12 days, there were discrepancies totaling 43.75 hours, or an average of over 3.5 hours per day.

The General Counsel and the Union contend that Moldenhauer failed to conduct a meaningful investigation or give Garcia an opportunity to explain himself prior to discharging him. They contend that Moldenhauer made errors in reviewing the underlying documents and compiling her audit chart, and such errors reflect a hasty and inaccurate investigation. I have reviewed the data and conclude that while there are errors in the audit chart, those errors do not erase or negate the overwhelming evidence of significant and unexplained discrepancies between documents that should reflect the same or similar information.[60]

The General Counsel and the Union raise several arguments regarding the e-logs. They contend from the outset that Garcia did not receive training or know how to use the Qualcomm device. Aside from Garcia's testimony, and the day he failed to log off at the end of the day (December 8-9), there is no evidence he had any issues using the device. They also contend that the e-logs do not account for the time Garcia spent performing duties other than driving,

[60] As stated, on November 1, 2016, Respondent disciplined Garcia for handwriting in his start and end times on his timesheet rather than using the time clock. The timesheets during the four-week period at issue show that Garcia continued to regularly handwrite in his start and/or end times rather than use the time clock. Garcia explained he often would handwrite in his start or end times because the time clock often was broken. However, Respondent has disproven this claim. (R. Exhs. 10 and 11). Based on the overall evidence, it is reasonable to infer that Garcia continued to handwrite in his start or end times because it allowed him to record hours he was not working. Garcia denied he ever stole time by writing down hours he did not work. That denial is simply incongruent with the widespread discrepancies reflected between his timesheets and his e-logs.

such pre and post-trip inspections, locating trailers, fueling, etc. A tractor truck would need to be turned on to perform at least a portion of the pre-trip inspection, and drivers are instructed to log on to the Qualcomm device when they turn on the truck. Additionally, if logged on, the device would track those movements of driving the truck around to locate the trailer and/or to drive over to the fuel pumps to get fuel as either on-duty (non-driving) time or (on-duty) driving time. Similarly, if a driver needed to take the tractor or trailer to the barn for maintenance, before or after delivering the loads for the day, the e-log would track the time spent moving the truck as either on-duty (non-driving) time or (on-duty) driving time. There are tasks that Garcia identified he performs that do not involve turning on or moving the truck, such as clocking in, getting his paperwork, having a dispatcher locate his tractor trailer, but he estimated that only took about 10-15 minutes a day. The General Counsel and the Union also point out that there were times Garcia would remain in the yard waiting to be dispatched, cleaning, or finishing paperwork, which would not be reflected on the e-logs. However, that time should be noted on his timesheets as being at the Chino facility, as opposed to being out performing loads. Garcia's timesheets typically show he was out performing his loads within 1-1.5 hours of him arriving at the facility. I, therefore, reject this argument.

The General Counsel and the Union contend that during the January 5 termination meeting, Moldenhauer did not give Garcia a meaningful opportunity to explain the discrepancies, and she failed to investigate his explanations by talking to other managers or supervisors or reviewing other documents (e.g., bills of lading). Moldenhauer presented Garcia with the report, the timesheets, and the electronic logs; she then went through each day with him and asked him to explain. Garcia initially stated he performs pre-trip and post-trip inspections, and he gets fuel. All of which the DOT considers on-duty time, and to be reflected as such on the log. Moldenhauer asked him why none of that is noted on his logs. Garcia had no response. Moldenhauer told him that he is supposed to document his time. At that point, Garcia admitted that he often stands around bullshitting with the guys in the yard and loses track of time. He had no other explanation. The General Counsel and Union contend that Moldenhauer should have gone to Barragan or Rendon to verify what Garcia was saying, because she did not have first-hand knowledge about the drivers' duties and how the Qualcomm device worked. However, it was Barragan and Rendon that complained to her previously about Garcia, and Barragan again after she notified him about Garcia's suspension, that they were having problems with him being and staying at work and taking assignments. The discrepancies Moldenhauer uncovered during her audit confirmed what they had said about Garcia not being there when he was supposed to be or doing what he was supposed to be doing. And, it was more than sufficient for Moldenhauer to conclude that Garcia was reporting and getting paid for time he was not working.

The General Counsel also argues disparate treatment because Respondent tolerated Alex Arzola's poor attendance and misconduct without discharging him. I do not view Arzola and Garcia as comparables. Arzola was the Manager at the Chino facility. Garcia was a floater driver. Tom Lanting testified that when Arzola was on his game, everything worked well; when Arzola was not on his game, there were issues. As a salaried employee, Arzola was paid regardless of the number of hours he was at the facility. Lanting was lenient with Arzola regarding his attendance, up to a point, because of his performance when he was on his game. But he eventually discharged Arzola because of his attendance issues. The General Counsel attempts to draw comparisons between Arzola and Garcia based on the testimony from the former Director of Human Resources (Triay) that Arzola sold scrap metal from the yard for cash. However, when Triay reported this to Tom Lanting, Lanting stated he was aware of it and not bothered by it. In this case, there is no evidence Respondent was aware of and not bothered by Garcia falsifying his timesheets and getting paid for hours he had not worked. Once

Moldenhauer discovered what Garcia was doing, she confronted him with the information, gave him an opportunity to explain, and then terminated him when he had no explanation. For these reasons, I do not find Respondent's treatment of Arzola is evidence of disparate treatment.

Overall, I find Respondent's stated reason for terminating Garcia (falsifying his time records) is not pretextual.

I further conclude that Respondent has met its burden under *Wright Line* of establishing that it would have taken the same action against Garcia for falsifying his timesheets in the absence of his protected activity. Respondent introduced examples of employees it has discharged for falsifying their time records. Moldenhauer was personally familiar with the situations. One of the individuals (Rios) was a newer employee who worked for Respondent in Texas, and he was terminated on January 3, 2017, because he falsified his time report when he claimed to have worked until 7 p.m., when, in fact, he left at 2:30 p.m. (Tr. 1590)(R. Exh. 24). Another individual (Wilson) worked for Respondent in Manteca, California, and he was terminated on January 18, 2017, because Respondent conducted an audit of his time records about found that he had falsified his timesheets several times during the audit sample period. (Tr. 1587-1589)(R. Exh. 25). A third individual (Moore) worked for Respondent as part of its roller van group, and he was terminated on July 29, 2016, for time fraud because he submitted timesheets reporting hours of work he did not work. (Tr. 1587)(R. Exh. 26). The General Counsel and Union have failed to rebut the evidence establishing that Garcia falsified his time records, and they failed to rebut that Respondent has taken similar action against employees for falsifying time records, both before and after discharging him.

Based on the foregoing, I conclude the General Counsel has not established that Respondent discharged Garcia, in violation of Section 8(a)(3) and (1) of the Act. I, therefore, recommend the allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Gardner Trucking, Inc., is an employer engaged in commerce out of its Ontario, California facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by interrogating employees about their Union membership, activities, and sympathies.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging employees Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot, because of the employees' Union activities and/or to discourage others from engaging in those activities.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as set forth above.

7. I recommend dismissing the allegations that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging George Garcia, and that it violated Section

8(a)(1) of the Act, through Ceja and Rendon, by impliedly threatening employees with loss of employment because of their Union support.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot, shall be ordered to offer them reinstatement to their former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. As this violation involves a cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance *with Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 31 a report allocating the backpay award to the appropriate calendar year for each said employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall also compensate Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also be ordered to expunge from its files any and all references to the discriminatory and unlawful discharge of Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot, and notify each in writing that this has been done and that evidence of the discriminatory and unlawful action will not be used against them in any way.

The General Counsel requests that I order a responsible management official read the notice to the assembled employees or to have a Board agent read the notice in the presence of a responsible management official. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB 1350, 1355-1356 (2014); *Excel Case Ready*, 334 NLRB 4, 4-5 (2001). This remedy is atypical and generally ordered in situations when there is a showing that the Board's traditional notice remedies are insufficient, such as when a respondent is a recidivist violator of the Act, when unfair labor practices are multiple and pervasive, or when circumstances exist that suggest employees will not understand or will not be appropriately informed by a notice posting. Here, the violations are serious, but I do not find circumstances to warrant a notice reading remedy.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[61]

ORDER[62]

1. Cease and desist from

(a) Interrogating employees about their union membership, activities, and sympathies.

(b) Discharging or otherwise discriminating against employees because of their union activities and/or to discourage others from engaging in those activities;

(c) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot full reinstatement to their former jobs, or if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot for any loss of earnings and other benefits suffered as a result of their unlawful discharge, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(c) Compensate Correa, Dellorfano, Nava, Rojo, Sanchez, and Talbot for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Correa, Dellorfano, Nava, Rojo, Sanchez, andTalbot and within 3 days thereafter, notify said employees in writing that this has been done and that the discharge will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored

[61] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[62] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities at its Ontario, California copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 11, 2018.

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their Union membership, activities, and sympathies.

WE WILL NOT discharge or otherwise discriminate against employees because of employees' union activities and/or to discourage others from engaging in those activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot full reinstatement to their former jobs or, if that job(s) no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot whole for any loss of earnings and other benefits resulting from their unlawful discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to our unlawful discharges of Ray Correa, Richard Dellorfano, Tony Nava, Kurt Leo Rojo, Gilbert Sanchez, and Michael Talbot, and we will notify each in writing that this has been done and that the discharge will not be used against them in any way.

GARDNER TRUCKING, INC.
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-191361 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 307-7302.